# ARTICLES

## THE "BLUE WALL OF SILENCE" AS EVIDENCE OF BIAS AND MOTIVE TO LIE: A NEW APPROACH TO POLICE PERJURY

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> Ah, the cops are far more complex than criminals. For they contain explosive contradictions within themselves. Supposed to be law-enforcers, they tend to conceive of themselves as the law. They are more responsible than the average man, they are more infantile. They are attached umbilically to the concept of honesty, they are profoundly corrupt. They possess more physical courage than the average man, they are unconscionable bullies; they serve the truth, they are psychopathic liars (no cop's testimony is ever to be trusted without corroboration); their work is authoritarian, they are cynical; and finally, if something in their heart is deeply idealistic, they are also bloated with greed. There is no human creation so contradictory, so finally enigmatic, as the character of the average cop. . . .[1]

### I. INTRODUCTION

From the perjury conviction of former Los Angeles Police Detective

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1. Norman Mailer, *The Great American Mystery: A New Dissent on the Methods and Findings of the Warren Commission*, BOOK WEEK, Aug. 28, 1966, at 1, 12.

Mark Fuhrman,[2] to revelations that FBI Crime Laboratory officers tailored their testimony in criminal cases,[3] several high-profile scandals have underscored the problem of police perjury in criminal prosecutions.[4] In 1994, the Mollen Commission,[5] appointed to investigate police misconduct in New York, reported that police "falsification"—which includes "testimonial perjury, . . . documentary perjury, . . . and falsification of police records"—is one of the most common forms of police corruption facing the nation's criminal justice system.[6] In fact, the Mollen Commission indicated that in New York, "the practice of police falsification . . . is so common in certain precincts that it has spawned its own word: 'testilying.' "[7] The problem has been identified in many parts of

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2. *See, e.g.*, Editorial, *Fuhrman's Perjury Revisited*, S.F. CHRON., Oct. 4, 1996, at A26; Jim Newton & Stephanie Simon, *Both Sides Gain Advantages by Cutting a Deal*, L.A. TIMES, Oct. 3, 1996, at A1.

3. *See, e.g.*, Gary Fields, *Inspector Defends FBI Crime Lab*, USA TODAY, May 14, 1997, at 6A (reporting allegations of careless work and perjured testimony by FBI lab employees); Richard A. Serrano, *Misconduct Allegations Arise in FBI Lab Probe Inquiry*, L.A. TIMES, Jan. 30, 1997, at A1 (reporting that FBI lab officials said that they were pressured by agents to fabricate scientific findings to support criminal prosecutions). *See generally* U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, THE FBI LABORATORY: AN INVESTIGATION INTO LABORATORY PRACTICES AND ALLEGED MISCONDUCT IN EXPLOSIVES-RELATED AND OTHER CASES (Apr. 1997) (comprehensive report issued by the Office of the Inspector General pursuant to 18-month investigation of alleged wrongdoing and improper practices of the FBI Crime Lab).

4. Examples of such scandals include: officers of the New York Police Department's 30th Precinct who engaged in illegal drug activity, perjury, and frame-ups of innocent citizens, *see, e.g.*, David Kocieniewski, *Perjury Dividend—A Special Report*, N.Y. TIMES, Jan. 5, 1997, § 1, at A1; police investigators in Troops C and F in upstate New York who were convicted and imprisoned for fabrication of fingerprint evidence and perjury, which tainted at least 36 cases from 1983 to 1992, *see, e.g.*, *Former Investigator Gets Year in Jail for Tampering*, POST-STANDARD (Syracuse), May 20, 1995, at A7; John O'Brien & Todd Lighty, *Pointing the Finger of Blame*, SYRACUSE HERALD J., Feb. 4, 1997, at A7; *State Police Lieutenant Gets Prison for Lying*, BUFFALO NEWS, Sept. 9, 1993, at A17; former assistant prosecutors and sheriff's deputies of DuPage County, Illinois, accused of conspiring to wrongfully convict two Hispanic men of murder—the two men spent close to 10 years on death row, *see, e.g.*, Don Terry, *Ex-Prosecutors and Deputies in Death Row Case are Charged with Framing Defendant*, N.Y. TIMES, Dec. 13, 1996, at A18; and officers in Philadelphia who beat and robbed residents of a poor, African-American section of the city, and then fabricated evidence and lied against the residents in court, resulting in at least 50 bogus drug convictions, which were subsequently overturned, *see, e.g.*, *Det. Vermin: Even Worse Than His Racism is the Damage that Cops Like Fuhrman Do to the System*, NEWSDAY, Aug. 31, 1995, at A38; David Shipler, *Living Under Suspicion*, N.Y. TIMES, Feb. 7, 1997, at A2.

5. *See* REPORT OF THE COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT (July 7, 1994) [hereinafter MOLLEN COMMISSION] (Milton Mollen, Chair), *reprinted in* 6 NEW YORK CITY POLICE CORRUPTION INVESTIGATION COMMISSIONS, 1894-1994 (Gabriel J. Chin ed., 1997) [hereinafter CHIN].

6. MOLLEN COMMISSION, *supra* note 5, at 36.

7. *Id.* The word appears in at least some versions of the report itself as "testifying," with an F rather than an L. However, it is clear that the report contains a typographical error, and was meant

the country, particularly New York,[8] Los Angeles,[9] Chicago,[10] and other large cities.[11] While the precise scope and pervasiveness of police perjury on a national level has been the subject of debate,[12] there is "a wide-

to be "testilying." *See, e.g.*, Morgan Cloud, *Judges, "Testilying," and the Constitution*, 69 S. CAL. L. REV. 1341, 1352 (1996) (quoting report as using word "testilying").

8. *See, e.g.*, David A. Harris, *Frisking Every Suspect: The Withering of* Terry, 28 U.C. DAVIS L. REV. 1, 35-36 (1994) (noting the Mollen Commission's findings that police perjury in New York is common, widespread, and accepted); Fred Kaplan, *NYC Police Accused of Pattern of Brutality*, BOSTON GLOBE, June 27, 1996, at 8 (noting report by Amnesty International which accused New York Police Department of abuses perpetuated by a code of silence); Kocieniewski, *supra* note 4, § 1, at A1 (according to one New York police officer, "lying under oath was standard procedure"); Selwyn Raab, *The Unwritten Code that Stops Police from Speaking*, N.Y. TIMES, June 16, 1985, § 4, at 6 (recognizing New York's police code of silence, and reporting testimony before a State Senate committee which indicated that the code of silence is " 'an old tradition' in all police forces").

9. *See, e.g.*, Maura Dolan, *Jury System is Held in Low Regard by Most*, L.A. TIMES, Sept. 27, 1994, at A1 (40% of Los Angeles county residents polled believe that "police officers commonly lie on the witness stand"); Jim Newton, *King Case Prosecutors Gamble on Eyewitness Testimony*, L.A. TIMES, Mar. 7, 1993, at 1 (asserting that discrepancies in police recollection of events of King beating are evidence of a police code of silence used to thwart investigation of the beating).

10. *See, e.g.*, Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 96 (1992) (police perjury in Chicago "unquestionably" occurs); Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1018 (1987) [hereinafter Orfield, *The Exclusionary Rule and Deterrence*] (noting that police perjury in Chicago "clearly exists").

11. *See* Cloud, *supra* note 7, at 1346-47 (discussing news reports addressing police falsification in Philadelphia, Los Angeles, Atlanta, New Orleans, Detroit, and Minneapolis, and stating that police misconduct, including perjury, "is a national problem and has been for decades"); Joseph D. McNamara, *Has the Drug War Created an Officer Liars' Club?*, L.A. TIMES, Feb. 11, 1996, at M1 (noting recent perjury scandals have surfaced in police departments in Los Angeles, Boston, New Orleans, San Francisco, Denver, New York, and other large cities); Al Neuharth, *O.J., Jewell Lesson: Testifiers, Testiliars?*, USA TODAY, Dec. 13, 1996, at 15A ("[I]n some major cities, perjury by police is becoming a shtick."); *see also* Cloud, *supra* note 7, at 1347 (noting allegations of perjury by members of Federal Bureau of Investigation crime laboratory to secure criminal convictions).

12. *See* Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693, 698 (1996) (asserting that the incidence of police perjury is common); Harris, *supra* note 8, at 36 (noting the pervasive practice of police perjury in New York is probably no different elsewhere around the nation); Martin A. Schwartz, *Admissibility of Investigatory Reports in § 1983 Civil Rights Actions—A User's Manual*, 79 MARQ. L. REV. 453, 454 (1996) ("From coast to coast, commissions and internal affairs units are being employed to investigate allegations of law enforcement misconduct and corruption."); Comment, *Police Perjury in Narcotics "Dropsy" Cases: A New Credibility Gap*, 60 GEO. L.J. 507, 507 (1971) (recognizing a "growing problem of police perjury in cases involving narcotics arrests"); Alan M. Dershowitz, *Controlling the Cops; Accomplices to Perjury*, N.Y. TIMES, May 2, 1994, at A17 (suggesting that police perjury in the criminal justice system is pervasive); Alan Dershowitz, *Police Perjury Is Rampant*, ROCHESTER TIMES UNION, Mar. 27, 1995, at A6 [hereinafter Dershowitz, *Police Perjury Is Rampant*] (purporting that all objective studies on the topic of police perjury indicate that "the problem of pervasive police perjury is rampant in every major city in the country"); Larry Reibstein, *Up Against the Wall*, NEWSWEEK, Sept. 4, 1995, at 24 (indicating that, according to defense attorneys, police perjury commonly occurs); Darlene Ricker, *Behind the Silence: Does Society Condone Police Brutality in Exchange for Getting Criminals Off*

spread belief that testilying is a frequent occurrence" throughout the nation.[13] Though largely anecdotal, the evidence is compelling that, as New

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*the Streets?*, A.B.A. J., July 1991, at 46 (quoting a deputy district attorney in the Los Angeles County D.A.'s office as stating, " 'Sure, cops have gotten up there on the stand and lied or made misstatements' "). *But see* CRIMINAL JUSTICE SECTION, AMERICAN BAR ASS'N, CRIMINAL JUSTICE IN CRISIS: A REPORT TO THE AMERICAN PEOPLE AND THE AMERICAN BAR ON CRIMINAL JUSTICE IN THE UNITED STATES: SOME MYTHS, SOME REALITIES, AND SOME QUESTIONS FOR THE FUTURE 21-22 (1988) [hereinafter CRIMINAL JUSTICE IN CRISIS] (concluding that the problem of testilying is "isolated" and observing that "no one has established the pervasiveness of the practice[]"); Edward G. Mascolo, *Impeaching the Credibility of Affidavits for Search Warrants: Piercing the Presumption of Validity*, 44 CONN. B.J. 9, 10 n.8, 29 n.97 (1970) (asserting that few cases exist on police perjury because of the infrequent occurrence of perjury); Kevin R. Reitz, *Testilying as a Problem of Crime Control: A Reply to Professor Slobogin*, 67 U. COLO. L. REV. 1061, 1062 (1996) (suggesting that one should view claims attesting to the certainty of the incidence of testilying suspiciously, because "[w]e know . . . nothing about the testilying 'rate,' its variations across and within police departments, its changes over time, or its etiology"); Reibstein, *supra*, at 25 (noting that although LAPD officers admit that perjury occurs, they deny widespread abuse).

13. Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1041 (1996); *see also* United States *ex rel.* Petillo v. New Jersey, 400 F. Supp. 1152, 1179 (D.N.J. 1975) (noting that "[b]oth commentators and courts have recognized the incidence of police perjury in criminal proceedings of all types"), *vacated and remanded sub nom.* Albanese v. Yeager, 541 F.2d 275 (3d Cir. 1976); Alan M. Dershowitz, *Police Perjury? "I'm Shocked!," in* THE ABUSE EXCUSE 233 (1994) (suggesting that "recent disclosures about rampant police perjury cannot possibly come as any surprise" to those who have practiced criminal law in state or federal courts); ALAN M. DERSHOWITZ, THE BEST DEFENSE at xxi-xxii (1983) ("Almost all police lie about whether they violated the Constitution in order to convict guilty defendants."); H. RICHARD UVILLER, VIRTUAL JUSTICE 131 (1996) (arguing that "today virtually every cop is accused of perjury by the defense . . . . [T]he possibility of perjury remains a pervasive factor."); Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1311-12 (1994) ("Judges, prosecutors, defense lawyers, and repeat offenders all know that police officers lie under oath."); Cloud, *supra* note 7, at 1344-45 (purporting that "[m]ost participants in the criminal justice system know that in some cases some police officers lie under oath"); Joseph D. Grano, *A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury*, 1971 LAW F. 405, 409 (1971) ("[T]he police often are not adverse to committing perjury to save a case."); Orfield, *The Exclusionary Rule and Deterrence*, *supra* note 10, at 1051 (Almost all of the officers in author's study admitted that the police commit perjury, and "it is possible that the frequency of police lying in court is greater than the police admit."); Slobogin, *supra*, at 1042 (asserting that "[f]ew knowledgeable persons are willing to say that police perjury about investigative matters is sporadic or rare"); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 427 (1996) (asserting that "the reported cases of police lying represent only a fraction of the actual cases in which police lying occurred"); Irving Younger, *Constitutional Protection on Search and Seizure Dead?*, 3 TRIAL 41 (1967) (asserting that police perjury is commonplace); Kocieniewski, *supra* note 4, § 1, at A1 (noting that according to one New York police officer, "lying under oath was standard procedure"); *Lie Detectors Could Curb Police Perjury*, USA TODAY (mag.), Aug. 1, 1996, at 13 ("[M]any experienced trial lawyers have said they believe police officers frequently lie on the stand."); McNamara, *supra* note 11, at M1 ("[H]undreds of thousands of law-enforcement officers commit felony perjury every year testifying about drug arrests."); William K. Rashbaum, *The Odd Couple; Style of New Cop Watchdog Doesn't Match Predecessor*, NEWSDAY, Feb. 1, 1995, at A17 (recognizing that most police officers privately acknowledge that committing perjury is not uncommon); Scott Turow, *Simpson Prosecutors Pay for Their Blunders*, N.Y. TIMES, Oct. 4, 1995, at A21 (asserting that district attorney's decision to place

York's Mollen Commission has recognized, police perjury is a "serious problem facing the . . . criminal justice system."[14] Police perjury may have terrible consequences. In individual cases, not only may the guilty be wrongly acquitted, but the innocent may be wrongly convicted. Over time, average citizens may lose faith in the police department and in the law itself.

Part II of this article identifies and discusses some of the basic categories of police perjury. Police occasionally commit perjury for malicious reasons, for example, in order to frame the innocent. A more common motivation for police perjury is to evade the exclusionary rule by lying in a suppression hearing.

Police officers also sometimes lie under oath because of the "blue wall of silence," an unwritten code in many departments which prohibits disclosing perjury or other misconduct by fellow officers, or even testifying truthfully if the facts would implicate the conduct of a fellow officer.[15] The existence of some form of a police code of silence in many

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police officers on the witness stand at pretrial hearing to tell perjurious story is "routine"); Irving Younger, *The Perjury Routine*, THE NATION, May 8, 1967, at 596-97 [hereinafter Younger, *The Perjury Routine*] (asserting that "[e]very lawyer who practices in the criminal courts knows that police perjury in commonplace"). *But see* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 935 & n.142 (1991) (arguing that "[t]here is a good deal of anecdotal discussion by actors in the system who believe perjury occurs with some frequency, but little in the way of evidence that would indicate how often or with what effects") (footnote omitted).

14. MOLLEN COMMISSION, *supra* note 5, at 36.

15. *See* Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151, 203 (1994); David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 481 n.60 (1992); Michael Cooper, *2d Officer Gives Account of Sex Assault of Haitian*, N.Y. TIMES, Aug. 18, 1997, at B3; John Kifner, *Officers Assigned to Haiti Are to Join 70th Precinct*, N.Y. TIMES, Aug. 20, 1997, at B3; Carol A. Watson, *Complaints Meet a Wall of Silence*, L.A. TIMES, Mar. 10, 1991, at 5 (code of silence perpetuates corruption); *All Things Considered: Blue Wall of Silence* (NPR radio broadcast, Aug. 20, 1997), *available in* 1997 WL 12832487; *see also* MOLLEN COMMISSION, *supra* note 5, at 53; REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 168 (1991) [hereinafter CHRISTOPHER COMMISSION] (Warren Christopher, Chair). Many different terms may be used to refer to the practice of police refusing to provide information about fellow officers' corruption, including: "code of silence," *see, e.g.*, CHRISTOPHER COMMISSION, *supra*, at 168; JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW 108 (1993); "blue wall of silence," *see, e.g.*, Magee, *supra*, at 203; "blue curtain," *see, e.g.*, Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 763 (1993); "code of the 'blue fraternity,' " *see, e.g.*, MOLLEN COMMISSION, *supra* note 5, at 58; the "brotherhood of lies," *see, e.g.*, *Serpico: Pattern of Lies Lingers*, LAS VEGAS REV. J., Oct. 3, 1993, at 9A; the "blue code of silence," *see, e.g.*, Magee, *supra*, at 156; and the "Blue Cocoon," *see* POLICE STRATEGY NO. 7: ROOTING OUT CORRUPTION; BUILDING ORGANIZATIONAL INTEGRITY IN THE NEW YORK POLICE DEPARTMENT 77 (June 14, 1995) [hereinafter POLICE STRATEGY NO. 7] (quoting Police Commissioner William J. Bratton). This article will commonly use the terms "code of silence" and "blue wall of silence" interchangeably to refer to such practice.

police departments across the nation is well documented in court opinions,[16] scholarly literature,[17] news reports,[18] and police investigatory com-

16. *See* Spell v. McDaniel, 824 F.2d 1380, 1392-95 (4th Cir. 1986) (affirming jury verdict imposing municipal liability for arrestee's injuries from excessive use of force; evidence of code of silence and force training was sufficient to demonstrate municipal custom and usage); United States v. Ambrose, 740 F.2d 505, 521 (7th Cir. 1984) (appendix to case, reprinting remarks of Grady, J., of the United States District Court for the Northern District of Illinois, made at sentencing hearing of defendant, who stated that "it is a fact . . . that there is a code of silence [in the Chicago Police Department], and that most policemen observe it"); Myatt v. City of Chicago, No. 90-C-03991, 1991 WL 94036, at *7 (N.D. Ill. May 23, 1991) (determining that allegations by plaintiff in police brutality case, including, *inter alia*, admission of officers of existence of code of silence, were sufficient to withstand motion to dismiss); McLin v. City of Chicago, 742 F. Supp. 994, 1002 (N.D. Ill. 1990) (holding that allegations by plaintiff of code of silence as policy or custom of city properly stated claim under 42 U.S.C. § 1983); Brandon v. Allen, 645 F. Supp. 1261, 1266-67 (W.D. Tenn. 1986) (finding a code of silence throughout the police department and determining that the city was liable for the code of silence which permitted abusive police behavior). In a recent line of cases from New York regarding the police code of silence, police brutality plaintiffs have sought to invoke the Mollen Commission report and other evidence of the existence of the pervasive code to demonstrate custom or policy liability on behalf of municipalities. *See, e.g.*, Shaw v. City of New York, No. 95-CIV.-9325 AJP, 1997 WL 187352, at *5, 7-10 (S.D.N.Y. Apr. 15, 1997). Similarly, the Mollen Commission report has been invoked in cases involving claims by officers against their departments or other municipal defendants. The officers claim that the defendants violated their First Amendment right to free speech when the defendants retaliated against the officers in response to officers breaking the code of silence. The crux of the argument in many of these types of cases is that First Amendment free speech rights are violated because the established policy precludes the officer from asserting a right to speak out about police misconduct. *See, e.g.*, White-Ruiz v. City of New York, No. 93-CIV.-7233 (DLC) (MHD), 1996 WL 603983 (S.D.N.Y. Oct. 22, 1996); Domenech v. City of New York, 919 F. Supp. 702, 711 (S.D.N.Y.), *on reargument*, 927 F. Supp. 106 (S.D.N.Y. 1996); Ariza v. City of New York, No. CV-93-5287, 1996 WL 118535 (E.D.N.Y. Mar. 7, 1996). Many claimants in other police brutality and police department retaliation cases have at least alleged some evidence of the existence of a code of silence to help establish liability against a municipality. *See, e.g.*, Sledd v. Linsday, 102 F.3d 282, 287, 288-89 (7th Cir. 1996) (excessive force claimant alleged injury as a result of code of silence policy of department because officers inflicting injury on claimant knew they would not be subject to scrutiny by superiors); Marshall v. Gates, 44 F.3d 722, 723 (9th Cir. 1995) (alleging code of silence to demonstrate police department retaliation); Mason v. Stock, 955 F. Supp. 1293, 1313-14 (D. Kan. 1997) (excessive force claimant alleged policy and custom of department through code of silence); Sharp v. City of Houston, 960 F. Supp. 1164, 1174-76 (S.D. Tex. 1997) (police officers alleged custom and municipal policy of retaliation for speaking out against department misconduct by providing evidence of code of silence); Williams v. Morris, 956 F. Supp. 679, 682 (W.D. Va. 1996) (police officer alleged violation of free speech due to his termination by department in retaliation for breaking code of silence); Alexander v. Village of Glenwood, No. 95-C-2326, 1996 WL 6545, at *1 (N.D. Ill. Jan. 8, 1996) (plaintiff alleged that police code of silence facilitated and encouraged civil rights violations by police); Bradley v. Fisher, 688 A.2d 527, 529 (Md. Ct. Spec. App. 1997) (police officers alleged wrongful discharge due to retaliation for breaking code of silence); *see also* Wilson v. Meeks, 52 F.3d 1547, 1556-57 (10th Cir. 1995) (finding that in a police shooting case, allegations of cover-up resulting from code of silence did not establish constitutional violation for deprivation of the right to access to courts); Davis v. Wayne County Sheriff, 507 N.W.2d 751 (Mich. Ct. App. 1993) (holding that allegations by plaintiff that code of silence contributed to injuries she sustained as a result of the shooting rampage by her husband, a police officer, were insufficient to demonstrate policy by which the department was unable

to obtain evidence regarding the officer's propensity for violence).

17. *See* SKOLNICK & FYFE, *supra* note 15, at 110 (attesting to the existence of a code of silence); David S. Cohen, *Official Oppression: A Historical Analysis of Low-Level Police Abuse and a Modern Attempt at Reform*, 28 COLUM. HUM. RTS. L. REV. 165, 190-92 (1996) (recognizing the existence of "the infamous 'blue code of silence,' " and asserting that abuse of police authority cannot be alleviated by providing for mandatory additional officers on the scene because of the code); Dripps, *supra* note 12, at 701 (asserting that police abuse can survive only if it is effectively covered-up through a police code of silence); Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 725 (1996) (recognizing the code of silence as one of the obstacles to prosecution of police brutality); Magee, *supra* note 15, at 156, 203 (discussing the Mollen Commission's findings regarding the police code of silence); Robert M. Myers, *Code of Silence: Police Shootings and the Right to Remain Silent*, 26 GOLDEN GATE U. L. REV. 497, 520 (1996) (asserting that a police officer's right to remain silent about police shootings "can only further the unwritten code of silence that is prevalent in many police agencies") (footnote omitted); Rudovsky, *supra* note 15, at 481, 486-87 (indicating that the code of silence may frustrate investigation and adjudication of claims of police abuse); Schwartz, *supra* note 12, at 454 (recognizing the existence of a code of silence from the findings of both the Mollen Commission and the Christopher Commission); Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81, 177 (1994) (asserting that establishing municipal liability for customary informant misconduct or mishandling is difficult to prove because the code of silence often eliminates appropriate avenues of proof); Patton, *supra* note 15, at 763 (recognizing that the "code of silence" or "blue curtain" is a major barrier to plaintiffs' attorneys in § 1983 police brutality actions).

18. *See* Michael Beebe, *Indictment Cracks Police Silence*, BUFFALO NEWS, June 30, 1996, at A1 (recognizing that indictment charging police officer with the death of a suspect was "the first public sign that a special grand jury pierced a police 'blue wall of silence' "); Alan Dershowitz, Editorial, *Some Cops Go Bad When We Don't Insist They Be Good*, ROCKY MOUNTAIN NEWS, Oct. 4, 1993, at 34A [hereinafter Dershowitz, *Some Cops Go Bad*] (pervasive blue wall of silence); Dershowitz, *Police Perjury Is Rampant*, *supra* note 12, at A6 (describing the blue wall of silence); Kaplan, *supra* note 8, at 8 (noting report by Amnesty International which accused New York Police Department of abuses perpetuated by a code of silence); Athelia Knight & Benjamin Weiser, *D.C. Chief Praises Officer Who Broke Police Silence Code*, WASH. POST, Dec. 16, 1983, at B1 (citing an interview with D.C. police chief who stated that "the 'code of silence' is an unavoidable fact of life in his police department, and others"); David Kocieniewski, *Rooting Out Rogue Cops*, NEWSDAY, Apr. 21, 1994, at A5 (reporting recommendations of the Mollen Commission to use measures such as lie-detector tests to defeat the blue wall of silence); Clifford Krauss, *Inquiry on Washington Spree Is Seen as Test of Police Resolve*, N.Y. TIMES, May 24, 1995, at B1 ("famed blue wall of silence"); Leonard Levitt, *Cracks Appear in the Blue Wall of NYPD Silence*, NEWSDAY, Apr. 21, 1997, at A22 (noting that 11 of the 30 police officers sentenced in the 30th precinct scandal turned in other officers; thus asserting that the blue wall of silence has been pierced); Claude Lewis, *Fallout From the Brooklyn Torture Case; Police Risk Losing a Critical Ally, Their Community*, THE RECORD (Bergen County, N.J.), Sept. 9, 1997, at L13 (asserting that police officers covering up for abusive fellow officers "has become somewhat of a tradition all over the country"); Newton, *supra* note 9, at 1 (asserting that discrepancies in police recollection of events of King beating are evidence of a police code of silence used to thwart investigation of the beating); Richard T. Pienciak, *Bitter Tale Nears End*, DAILY NEWS (New York), Sept. 7, 1997, at 29 (reporting that officer admitted to giving inaccurate testimony in Yonkers police brutality case to support police department's "blue wall of silence"); Maurice Possley & Andrew Martin, *'Code' is Cracking in Austin Case; Wall of Secrecy Around Corruption Begins to Crumble*, CHI. TRIB., Feb. 3, 1997, at 1 (recognizing dilemma of police officers charged with robbing drug dealers between maintaining a code of silence and cutting a deal which would involve implicating former police partners); Raab, *supra* note 8, § 4, at 6 (recognizing

mission reports examining the subject.[19] Indeed, the Mollen Commission recognized a strong police code of silence in New York,[20] as did the Christopher Commission, appointed by Los Angeles Mayor Tom Bradley in response to the beating of Rodney King, which found that the code of silence was "[p]erhaps the greatest single barrier to the effective investigation and adjudication of complaints" against the Los Angeles Police Department.[21] Consistent with the loyalty obligation, in many departments, an officer who breaks the code of silence can expect brutal retaliation from his or her companions.[22] Part II also suggests that police perjury is a serious problem because it leads to inaccurate results; even with respect to the guilty, police perjury is undesirable because it undermines the legitimacy of the legal system and respect for law.

Because police perjury constitutes a criminal offense and has undesirable effects on the criminal justice system, it would be logical to assume that prosecutors, courts, and the majority of police officers who are

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New York's police code of silence, and reporting testimony before a State Senate committee which indicated that the code of silence is " 'an old tradition' in all police forces"); Reibstein, *supra* note 12, at 24 (indicating that defense attorneys believe that covering-up through a police code of silence occurs often); Ricker, *supra* note 12, at 46 (LAPD officers who beat Rodney King in front of numerous witnesses were confident that others would not tell because of code of silence); *Serpico: Pattern of Lies Lingers*, *supra* note 15, at 9A (reporting former New York police officer Frank Serpico's comments that the code of silence is perpetuated in the New York police system); Barry Tarlow, *Doing the Fuhrman Shuffle; Too Many Cops Think They Can Enforce the Law by Breaking It*, WASH. POST, Aug. 27, 1995, at C2 (noting that the video tapes of Rodney King beating "describe what those familiar with our criminal justice system have always known—that police perjury, racism, manufacturing of evidence and a code of silence to cover it all up, occur far too often"); Watson, *supra* note 15, at 5 (asserting that code of silence provides "virtually impenetrable layer of protection for violence-prone officers"); Sandra Widener, *From Brass on Down, Silence Is Order of Day*, NEWSDAY, Sept. 25, 1986, at 5 (recognizing a blue wall of silence in the 77th Precinct in New York City).

19. *See, e.g.*, MOLLEN COMMISSION, *supra* note 5, at 53-58 (discussing the pervasiveness of the code of silence); CHRISTOPHER COMMISSION, *supra* note 15, at 168 (referring to the Los Angeles Police Department's "code of silence"). The existence of the code of silence has been recognized in New York by the Knapp Commission report as well, prepared two decades before the Mollen Commission report, in response to a series of news articles appearing in the *New York Times* alleging widespread police corruption and laxity in handling such corruption. *See* REPORT OF THE COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE CITY'S ANTI-CORRUPTION PROCEDURES, at preface & 60 (Dec. 26, 1972) [hereinafter KNAPP COMMISSION] (Whitman Knapp, Chair), *reprinted in* 5 CHIN, *supra* note 5. The Knapp Commission indicated that during its investigation, individuals experienced in police work informed the Commission that "[t]he tradition of the policeman's code of silence was so strong . . . that it was futile to expect testimony [regarding corrupt activities] from any police officer." KNAPP COMMISSION, *supra*, at 47.

20. *See* MOLLEN COMMISSION, *supra* note 5, at 53.

21. CHRISTOPHER COMMISSION, *supra* note 15, at 168.

22. See *infra* part III.A (discussing the consequences officers may face by breaking the code of silence).

honest would be eager to deter it, detect it when it happens, and punish it severely whenever it is discovered. However, for a variety of reasons, elimination of police perjury has been difficult. Part III discusses the reasons that the criminal justice system has, to date, failed to control police perjury.

Neither prosecutors nor courts appear to have made elimination of police perjury a top priority. Perhaps the most important reason for this is the blue wall of silence, which, in addition to being a cause of perjury, is also a significant impediment to its discovery in individual cases and to its suppression in general. Officers who violate the blue wall of silence can be subjected to severe, even life-threatening retaliation; as a consequence, even honest officers have a strong disincentive to violate the blue wall of silence by testifying truthfully or disclosing that another officer has testified falsely. As a result of the threat of retaliation, explained detective Frank Serpico while testifying before the Knapp Commission, "the honest officer fears the dishonest officer and not the other way around."[23]

The pervasiveness and force of the blue wall of silence in New York City was underscored by a shocking incident involving the torture and brutalization of Abner Louima, a Haitian immigrant, by officers of Brooklyn, New York's 70th Precinct.[24] The incident tipped off a torrent

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23. JAMES LARDNER, CRUSADER: THE HELL-RAISING POLICE CAREER OF DETECTIVE DAVID DURK 212 (1996).

24. In August of 1997, Abner Louima was arrested by New York police officer Justin Volpe outside of a nightclub on Flatbush Avenue, in Brooklyn. *See* John Kifner, *Nurse Says Some Hospital Supervisors Tried to Cover Up Facts in Police Beating Case*, N.Y. TIMES, Aug. 26, 1997, at B3 [hereinafter Kifner, *Nurse Says Some Hospital Supervisors Tried to Cover Up Facts*]. On the way to the station house, four officers allegedly beat Mr. Louima and a second Haitian immigrant. *See id.*; *see also* Kifner, *supra* note 15, at B3 (indicating that prosecutors are looking into alleged beating of second Haitian immigrant). Upon arrival at the 70th Precinct station, Officer Volpe, with the aid of two other officers, allegedly took Mr. Louima into the bathroom and forced a wooden stick into his rectum and then into his mouth, resulting in a torn rectum and a lacerated bladder, broken teeth, *see* Dan Barry, *2d Police Officer Charged in Attack on Arrested Man*, N.Y. TIMES, Aug. 16, 1997, § 1, at 1 [hereinafter Barry, *2d Police Officer Charged in Attack on Arrested Man*]; Dan Barry, *Charges of Brutality; The Overview*, N.Y. TIMES, Aug. 15, 1997, at A1 [hereinafter Barry, *Charges of Brutality*]; Kifner, *Nurse Says Some Hospital Supervisors Tried to Cover Up Facts*, *supra*, at B3, and a broken jaw, *see* Merrill Goozner, *NYC Cut in Crime Has Brutish Side*, CHI. TRIB., Aug. 16, 1997, at 1. Mr. Louima was left in a precinct holding cell for more than 90 minutes before Emergency Medical Service arrived in response to a "low priority call" from the precinct involving "lacerations." Barry, *Charges of Brutality*, *supra*, at A1; Kifner, *Nurse Says Some Hospital Supervisors Tried to Cover Up Facts*, *supra*, at B3. After a 90-minute wait for a police escort, the ambulance left for the hospital. *See* Barry, *Charges of Brutality*, *supra*, at A1; Kifner, *Nurse Says Some Hospital Supervisors Tried to Cover Up Facts*, *supra*, at B3. Upon arrival at the hospital, officers told the medical staff that Mr. Louima had been injured in a homosexual act at a gay bar. *See* John Kifner, *Investiga-*

of media commentary about the code of silence in New York.[25] Of the

*tors Looking at New Allegations in Brutality Case*, N.Y. TIMES, Aug. 21, 1997, at B1 [hereinafter Kifner, *Investigators Looking at New Allegations*]; DeWayne Wickham, *Another Voice: After Haitian Immigrant Assault, N.Y. Police Housecleaning Needed*, GANNETT NEWS SERV., Aug. 21, 1997, *available in* 1997 WL 8835004.

In response to these allegations, Police Commissioner Howard Safir "swept the precinct clean" by reassigning two supervisors, suspending a desk sergeant, and placing at least 10 other officers on desk duty. Barry, *Charges of Brutality*, *supra*, at A1; *see also* Leonard Levitt, *A Detective Transferred*, NEWSDAY, Aug. 28, 1997, at A33 (indicating that a total of 19 officers have been disciplined in connection with the incident). Officer Volpe has been criminally charged in the incident with sexual abuse and assault. *See* Barry, *Charges of Brutality*, *supra*, at A1. A second officer, who helped Volpe hold down the victim, was also charged, as well as two other officers involved in the incident. *See* Barry, *2d Police Officer Charged in Attack on Arrested Man*, *supra*, § 1, at 1; Wickham, *supra*. Mr. Louima and his family were placed under police protection due to threats made by his attackers. *See, e.g.*, Tom Hays, *Vicious Attack Stains City's Improved Image*, HOUS. CHRON., Aug. 16, 1997, at 3.

25. *See* Barry, *Charges of Brutality*, *supra* note 24, at A1 (indicating that difficulties with investigation of 70th Precinct brutality is a result of "reluctance of some officers . . . to cooperate," that there is pressure on officers from both colleagues and union officials to withhold information, and that there is evidence that officers attempted to " 'cover tracks and clean things up' "); Joel Berger, *See-No-Evil Officers Should Pay*, N.Y. TIMES, Aug. 24, 1997, § 4, at 13 (discussing cover-up of police brutality in New York); Lawrence Goodman, *Louima Coverup Try? Teen Sez Cops Ordered Silence*, DAILY NEWS (New York), Sept. 4, 1997, at 6 (reporting that witness in 70th Precinct holding cell saw police officers and at least one paramedic conspire to cover up injuries to victim); Tom Hays, *New York Police Deny Injuring Haiti Immigrant*, AUSTIN-AM.-STATESMAN, Aug. 23, 1997, at A4 (reporting that explanation given by police that victim's injuries were result of "homosexual act" was, according to lawyer for victim, cover-up); Kifner, *Investigators Looking at New Allegations*, *supra* note 24, at B1 (reporting that prosecutors investigating alleged 70th Precinct brutality widened inquiry to determine whether officers attempted to cover up attack); Editorial, *Know Them by Their Silence*, DAILY NEWS (New York), Aug. 20, 1997, at 32 (suggesting the existence of code of silence in alleged 70th Precinct brutality case); David Kocieniewski, *Detective Mishandled Early Tip in Torture Case, the Police Say*, N.Y. TIMES, Aug. 24, 1997, § 1, at 27 (reporting that lawyers for victim of alleged 70th Precinct brutality cite delay in logging number to case as evidence of police cover-up); Lewis, *supra* note 18, at L13 (discussing code of silence surrounding 70th Precinct brutality scandal); Wickham, *supra* note 24 (detailing substance of 70th Precinct conspiracy and cover-up among officers); *All Things Considered, Blue Wall of Silence*, *supra* note 15 (discussing the "blue wall of silence"); *News Forum* (WNBC television broadcast, Aug. 24, 1997), *available in* 1997 WL 10281561 (discussing the "blue wall of silence" in New York). *But see* Goozner, *supra* note 24, at 1 (asserting that "shakeup" at 70th Precinct, including removal of captain and reassignment of nine officers for failing to cooperate in investigation, indicates collapse of "blue wall of silence"); *CBS Evening News: Police Officers Beginning to Cooperate in Case of Sexual Abuse and Assault of a Haitian New York Resident by a Fellow Officer* (CBS television broadcast, Aug. 16, 1997), *available in* 1997 WL 5614872 (asserting that "blue wall of silence" has begun to come down in New York due to 70th Precinct brutality case, and quoting police commissioner Howard Safir as stating "[t]here absolutely is not a blue wall of silence"); *Nightline: Voices from the NYPD's Brooklyn Precincts* (ABC television broadcast, Aug. 21, 1997), *available in* LEXIS, News Library (according to NYC police officer interviewed, "[i]f someone is committing a criminal act, there's no such thing as a blue wall of silence").

Evidence of the operation of the code of silence in the Brooklyn torture case is abundant. For example, investigators in the case indicated that "the sequence of events inside the station house re-

some 100 officers granted departmental immunity and interviewed by in-

mained clouded by contradiction and the reluctance of some officers at the 70th Precinct to cooperate," and that " 'there is a lot of pressure' on officers, from colleagues and union officials, not to provide information." Barry, *Charges of Brutality*, *supra* note 24, at A1. Some commentators allege that delays in key events by police officers and officials is a product of a cover-up in the case. In particular, a delay of 36 hours between the time of the incident and the time investigators even stepped foot in the 70th Precinct station house may have allowed fellow officers time to hide or destroy evidence implicating Officer Volpe, including the wooden stick used to sodomize Mr. Louima, *see* Barry, *Charges of Brutality*, *supra* note 24, at A1; Lewis, *supra* note 18, at L13, and other incriminating evidence, *see* Dan Barry, *Officers' Silence Still Thwarting Torture Inquiry*, N.Y. TIMES, Sept. 5, 1997, at A1 [hereinafter Barry, *Officers' Silence Still Thwarting Torture Inquiry*] (asserting that Officer Volpe's locker had been "cleaned out" by the time investigators arrived to search); Kifner, *supra* note 15, at B3 (reporting that according to investigators, police companions of Officer Volpe cleaned dreadlocks cut by Volpe from the hair of Jamaican suspects from his locker before Internal Affairs investigators could search for evidence). In fact, detectives did not begin searching for the stick allegedly used in the attack until four days after the attack, *see* John Kifner, *Nurse Claims Staff Cover-Up On Louima*, N.Y. TIMES, Aug. 25, 1997, at B1 [hereinafter Kifner, *Nurse Claims Staff Cover-Up On Louima*], and did not begin a general investigation until receiving a second call on the incident, 36 hours after the initial reports of the attack, *see* Bob Herbert, *In America*, N.Y. TIMES, Aug. 24, 1997, § 4, at 13. Moreover, a nurse who was involved in treating Mr. Louima reported that when she called internal affairs to report the incident, "[i]t seemed like [the officer] didn't care," that she felt that her call was not taken seriously, and that the lax attitude was evidence that the police were biding time to secure the scene in furtherance of a cover-up. Kifner, *Nurse Says Some Hospital Supervisors Tried to Cover Up Facts*, *supra* note 24, at B3. In addition, New York Mayor Rudolph Giuliani "demanded that other officers at the [70th] precinct set aside allegiance to colleagues and step forward with anything they know." Barry, *Charges of Brutality*, *supra* note 24, at A1. Two officers have confirmed the allegations of brutality, but only after "parrot[ing] the gay-bashing version of what happened to Louima." Wickham, *supra* note 24. More importantly, out of almost 100 officers who have been granted limited immunity in the case and interviewed by investigators, only two stepped forward, while the others commented that they knew nothing about the incident or were not present. *See* Barry, *Officers' Silence Still Thwarting Torture Inquiry*, *supra*, at A1; Lewis, *supra* note 18, at L13. Police Commissioner Howard Safir placed all 700 internal affairs investigators on the case—an indication that Commissioner Safir has "reason to believe there's a problem" in New York. Editorial, *Brutal Attack of NYC Man in Police Custody and Other Studies Underscore the Need to Address Police Brutality Issue*, POST-STANDARD (Syracuse), Aug. 20, 1997, at A12.

There are also indications that the operation of the code of silence in this instance is far-reaching. For example, nurses at the hospital to which Mr. Louima was brought reported that supervisors attempted to pressure them to adhere to the story that Mr. Louima was injured at a gay bar, even though Mr. Louima had described the nature of his injuries to nurses. *See* Kifner, *Nurse Claims Staff Cover-Up On Louima*, *supra*, at B1; Kifner, *Nurse Says Some Hospital Supervisors Tried to Cover Up Facts*, *supra* note 24, at B3. In fact, one nurse indicated that officials had pressured her to change her written report of the incident. *See id.* Moreover, a witness who was present in one of the 70th Precinct holding cells stated that paramedics who responded to the call conspired to cover up the attack with the officers involved. *See* Goodman, *supra*, at 6. Finally, in a particularly alarming incident, one of the surgeons who operated on Mr. Louima "was threatened by an anonymous caller who encouraged the doctor to end" Mr. Louima's life, or else the caller would "get him [the surgeon]." Dan Morrison, *Louima's Surgeon Threatened*, NEWSDAY, Sept. 6, 1997, at A29. Officials stated that investigators were "considering the possibility that the call came from a police officer." *Id.*

vestigators, only two came forward to tell the story.[26] The city was compelled to place the two officers and their families under twenty-four-hour-a-day armed guard, fearing retaliation from fellow officers of the New York City Police Department.[27]

Part IV of this article proposes a partial solution to the problem of police perjury. In some jurisdictions, defendants will be able to show, through expert testimony or commission reports, that officers are subject to a code of silence. In cases where testimony helpful to a defendant would violate the code of silence, the jury should be allowed to hear that fact when evaluating the testimony of the officer. While our research has uncovered no cases in which this approach was used in a criminal prosecution, the proposal involves nothing more than application of traditional rules allowing a witness to be impeached for bias or motive to lie to a novel situation.

This approach would have several salutary effects. First, by giving juries more information about the credibility of witnesses, it should increase the accuracy of criminal trials. Perhaps more importantly, it should contribute to breaking down the blue wall of silence. If police officials and prosecutors eliminate a code of silence in a particular jurisdiction, there would no longer be any basis to allow impeachment of officers on the ground that they might be influenced by it.

This proposal is consciously incremental and practical. There might be ways of solving the problem of police perjury more quickly and more effectively by, for example, giving prosecutors direct control over the police within their jurisdiction. If police officers were subject to direction

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26. *See* Lewis, *supra* note 18, at L13.

27. *See* Barry, *2d Police Officer Charged in Attack on Arrested Man*, *supra* note 24, § 1, at 1; James Bone, *Blacks in Anti-Police Protest*, TIMES OF LONDON, Aug. 18, 1997, at 11; *Brutality in the Precinct; N.Y.P.D.'s Reputation Soiled by the Code of Silence*, PITT. POST-GAZETTE, Aug. 25, 1997, at A8; Cooper, *supra* note 15, at B3; John Kifner, *Charges of Brutality: The Overview; Thousands March to Protest Police*, N.Y. TIMES, Aug. 17, 1997, § 1, at 1; Paul Schwartzman, *2d Cop Held in Torture Case*, DAILY NEWS (New York), Aug. 16, 1997, at 3; Frank Serpico, *Setting the Tone for Police Reform*, N.Y. TIMES, Aug. 30, 1997, § 1, at 23; *see also* Editorial, *Know Them by Their Silence*, *supra* note 25, at 32 (asserting that "Turetzky [officer who first came forward in Louima case] is under police protection, which says two things quite clearly. 1) When it comes to certain cops, a man with a conscience can be in danger; and, 2) Obviously, there are enough decent sorts in the NYPD to afford Turetzky the protection he deserves. And needs."); Lewis, *supra* note 18, at L13 (quoting interview with a Manhattan police officer: "When we're out there late at night, we only have each other. . . . When a problem arises, he'd only have to turn his back. I might get blown away. . . . Trust me, it's happened."); *News Forum*, *supra* note 25 (Police Commissioner Safir commented that Officer Boria, who testified at the trial of a New York officer who applied a fatal chokehold to a suspect, had to be protected because she indicated that the suspect was not struggling, but lying motionless when the hold was applied).

and discipline by prosecutors, it might well be that police conduct would improve. Such a reform might be worth thinking about; because police investigatory work is ultimately on behalf of prosecutors, it might be justifiable to give prosecutors authority over how investigations are performed. In addition, although prosecutors are under pressure to win cases, they are also subject to discipline by courts in a way that police officers are not. Whatever the merit and deficiencies of this structural reform, it is inconceivable that it could ever actually happen. The approach set forth in this article is less grand, but, we hope, more realistic.

## II. THE PROBLEM OF POLICE PERJURY

It seems self-evident that truth is generally good and lies are generally bad.[28] Nevertheless, police perjury creates particular problems that other kinds of perjury do not, and thus should be treated as a matter of special concern by the criminal justice system. Police testimony, even perjurious testimony, is more persuasive to juries than testimony by civilian witnesses.[29] Police are professional witnesses, perhaps the most experienced witnesses of any occupational group.[30] Moreover, officers have special credibility. In a confrontation between a civilian and a "blue knight," a clear-eyed uniformed police officer, jurors may well bend over backwards to believe the person in blue.[31]

While police officers may not be inherently more likely to commit perjury than civilian witnesses, unlike witnesses in civil matters, they testify in cases where liberty or even life is routinely at stake. Thus, as discussed in part II.A, police perjury is more likely to lead to serious injustice—imprisonment or even execution of an innocent person.[32]

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28. *See Exodus* 21:23 ("[A]nd God spake these words, saying: . . . 'thou shall not bear false witness against they neighbor.' "); 2 MIGUEL CERVANTES, DON QUIXOTE 33 ("Honesty is the best policy.").

29. *See infra* notes 107-08 and accompanying text.

30. *See, e.g.*, Stanley A. Goldman, *Guilt by Intuition: The Insufficiency of Prior Inconsistent Statements to Convict*, 65 N.C. L. REV. 1, 20 (1986) (suggesting that police officers have experience testifying in court); Comment, *Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, 1993 UTAH L. REV. 149, 185 (asserting that since police officers are experienced witnesses they are well respected by jurors, appearing to be highly credible).

31. See *infra* notes 107-08 and accompanying text.

32. "[T]he deprivation of an innocent defendant's life or liberty by the use of false testimony to secure his conviction violates his constitutional right to due process and is the most serious miscarriage of justice imaginable." Lisa C. Harris, Note, *Perjury Defeats Justice*, 42 WAYNE L. REV. 1755, 1758 (1996) (citing MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992) and Bryan K. Fair, *Using Parrots to Kill Mockingbirds: Yet Another Racial Prosecution and Wrongful Conviction In Maycomb*, 45 ALA. L. REV. 403, 426 (1994)).

What is probably a more common form of police perjury occurs with respect to defendants whom the police believe to be guilty and who may in fact be guilty. Many commentators believe that police frequently lie in the context of pretrial suppression hearings which determine claims that evidence was seized as the result of an unconstitutional search or arrest and thus should be suppressed pursuant to the exclusionary rule and deemed inadmissible at trial.[33] Critics of the exclusionary rule may feel some sympathy to police who shade the truth in this context.[34] But even for those who reject the exclusionary rule, there are reasons to demand that the police tell the truth.

### *A. Frame-Ups*

In a recent case, New Yorker Daniel Batista, who had a clean record, was convicted of criminal possession of a weapon.[35] Batista's claim, supported by several civilian witnesses, was that the officers planted the gun after keys they confiscated from him failed to open doors of apartments the officers wanted to rob.[36] The officers, by contrast, testified that they found a firearm in Batista's possession.[37] One of the officers was later imprisoned for framing another defendant; the other was convicted of extorting money from drug dealers.[38] Batista's conviction was vacated only after he had served his prison sentence.[39] The jury forewoman later explained her vote in a case which now appears to have been a miscarriage of justice by saying, " '[i]t came down to the police officers' word against him and his friends. . . . And we just couldn't think of any reason why the police officers would go to the trouble of making up a story and framing someone.' "[40]

Unfortunately, police sometimes simply frame innocent people. When the cities are full of crime, it may seem odd that the police would choose to frame the innocent, rather than frame the guilty or simply use legitimate methods to prosecute criminals. However, a number of circum-

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33. *See infra* part II.B.

34. Some suggest that judges deny suppression motions in cases where police testimony is dubious because they do not want to exclude probative evidence. *See* U.S. DEP'T OF JUSTICE OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL: THE SEARCH AND SEIZURE EXCLUSIONARY RULE 27 (1986); Cloud, *supra* note 13, at 1323.

35. *See* Kocieniewski, *supra* note 4, § 1, at A1.

36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.*

40. *Id.*

stances have motivated police officers to frame innocent people. Sometimes police find it necessary to prosecute an innocent person to make it appear that police officers are doing their jobs. For example, vice officers receiving protection money sometimes arrest a "stand-in" provided by the gamblers. In this way, the business of actual gamblers is undisturbed and the officers look busy.[41] In other circumstances, unwilling citizens have been framed to provide cover for officers on the take who cannot, of course, arrest their benefactors. For example, one investigation of the New York Police Department concluded that "where the end of a month approached, and the record of arrests and convictions was low, the officers would arrest women indiscriminately, and frame up cases against them, until the number so arrested was sufficient to bring the officers' records up to the desired number."[42] Under a phenomenon known as "collars for dollars," officers make questionable arrests near the end of their tour of duty to earn overtime pay while processing a defendant through the system.[43] Police officers have framed innocent people as part of extortion schemes.[44] Police also sometimes frame the guilty, "to conceal other underlying acts of corruption or to conceal illegal steps taken for what officers often perceive as 'legitimate' law enforcement ends."[45]

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41. *See* EDWARD S. SILVER, REPORT OF SPECIAL INVESTIGATION BY THE DISTRICT ATTORNEY OF KINGS COUNTY AND THE DECEMBER 1949 GRAND JURY, DECEMBER 1949 TO APRIL 1954 at 54-55 (1955) [hereinafter HELFAND REPORT], *reprinted in* 4 CHIN, *supra* note 5; *see also* KNAPP COMMISSION, *supra* note 19, at 28, 83.

42. FINAL REPORT OF SAMUEL SEABURY, REFEREE, IN THE MATTER OF THE INVESTIGATION OF THE MAGISTRATE'S COURTS IN THE FIRST JUDICIAL DEPARTMENT AND THE MAGISTRATES THEREOF, AND OF ATTORNEYS AT LAW PRACTICING IN SAID COURTS at 95-96 (Mar. 28, 1932) [hereinafter SEABURY REPORT], *reprinted in* 3 CHIN, *supra* note 5.

43. *See, e.g.*, 1 CHIN, *supra* note 5, at xix n.44; MOLLEN COMMISSION, *supra* note 5, at 39-40; DAVID HEILBRONER, ROUGH JUSTICE: DAYS AND NIGHTS OF A YOUNG D.A. 65-66 (1990) (noting existence of "collars for dollars" phenomenon).

44. *See* 1 CHIN, *supra* note 5, at xix n.45; KNAPP COMMISSION, *supra* note 19, at 83-84 (describing practice of arresting bookmakers without evidence and then releasing them without filing charges, or, if charges were filed, intentionally botching cases for a fee); *id.* at 94-98 (describing threats of false narcotics charges); REPORT OF THE SPECIAL COMMITTEE APPOINTED TO INVESTIGATE THE POLICE DEPARTMENT OF THE CITY OF NEW YORK at 43-45 [hereinafter LEXOW REPORT] (Clarence Lexow, Chair) (describing frame-up of immigrant woman on prostitution charges, resulting in her loss of her children, and noting that "[m]any cases of similar oppression are found in the record"), *reprinted in* 1 CHIN, *supra* note 5; SEABURY REPORT, *supra* note 42, at 80-96 (discussing frame-ups in general and describing several individual cases).

45. MOLLEN COMMISSION, *supra* note 5, at 37; *see also id.* at 36-43 (noting perjury and falsification of documents).

## *B. Police Perjury in Suppression Hearings*

Perhaps the most common form of police perjury occurs in suppression hearings—pretrial proceedings designed to determine claims that evidence seized in the course of an illegal search or arrest should be suppressed pursuant to the "exclusionary rule" and deemed inadmissible at trial.[46] In the variant known as "dropsy" testimony, the police attempt to circumvent the Fourth Amendment's search and seizure requirements by

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46. *See* MOLLEN COMMISSION, *supra* note 5, at 36. The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. Absent a search warrant, a police officer may not legally search a person in compliance with the Fourth Amendment unless the officer's search conforms with one of the exceptions to the warrant requirement. *See* Comment, *supra* note 12, at 510. A warrant is not required if the search is incident to a lawful arrest. *See id.* "To perform a search incident to an arrest, a police officer must first possess probable cause to arrest a suspect in the belief that the suspect is committing or has committed a felony." *Id.*; *see also, e.g.*, Brinegar v. United States, 338 U.S. 160, 175-76 (1949) ("Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed.") (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)) (alterations in original). A second exception to the warrant requirement is the "stop and frisk" exception, which permits the officer to stop and interrogate a suspect if the officer reasonably believes the suspect is engaging in criminal activity. *See* Comment, *supra* note 12, at 511 (citing Terry v. Ohio, 392 U.S. 1, 30 (1968)). In addition, the Fourth Amendment does not apply where activities are carried on, or evidence is located, in plain view of the officer. *See* Comment, *supra* note 12, at 512.

Throughout most of the nation's history, no mechanism existed to enforce the provisions of the Fourth Amendment. *See, e.g.*, Orfield, *supra* note 10, at 76. Thus, if an individual suspected of a crime was searched without probable cause in violation of the Fourth Amendment, and was found to possess illegal contraband, the evidence was freely admissible. In 1914, however, the United States Supreme Court established the "exclusionary rule" in *Weeks v. United States*, 232 U.S. 383 (1914). The exclusionary rule provided that " 'evidence obtained from the defendant [in a criminal prosecution] in violation of his constitutional rights to be free from unreasonable searches and seizures will be suppressed by order of the court.' " JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL 211 (1966) (quoting Francis A. Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, *in* POLICE POWER AND INDIVIDUAL FREEDOM 77 (Claude R. Sowle ed., 1962)). The application of the exclusionary rule as propounded by *Weeks* was initially limited to federal prosecutions until 1961, when the Supreme Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), imposed the exclusionary rule upon the states. Thus, subsequent to *Mapp*, police officers found that they could no longer violate constitutional standards and testify truthfully about their search and seizure actions because *Mapp* rendered the illegally-obtained evidence inadmissible.

Some police responded to *Mapp* by tailoring their testimony about their actions; for example, to fit into the exceptions to the warrant requirement. *See, e.g.*, Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62*, 4 CRIM. L. BULL. 549, 552 (1968); Younger, *The Perjury Routine*, *supra* note 13, at 596-97. Officers might make the facts fit constitutional mandates by testifying that the suspect dropped the contraband, that the suspect actually gave the contraband to the officer, that the suspect held the contraband in his or her hand, or that the contraband was found in full view near the suspect (open possession). *See* Barlow, *supra*, at 555-67.

falsely testifying that a suspect dropped the narcotics or other contraband and ran upon seeing the officer, thus clothing the officer with authority to seize the contraband and probable cause to make an arrest.[47] In reality, the arrest may have been the result of a police shakedown, without probable cause and in violation of the suspect's Fourth Amendment rights, which revealed after the fact that the suspect did indeed possess illegal contraband.

Courts and commentators have noted that this type of dropsy testimony occurs often, typically in the same boilerplate fashion each time.[48] According to Irving Younger, "[s]pend a few hours in the New York City Criminal Court . . . and you will hear case after case in which a policeman testifies that the defendant dropped the narcotics on the ground, whereupon the policeman arrested him. Usually the very language of the testimony is identical from one case to another."[49]

The Mollen Commission recently concluded that perjury is "widely tolerated by corrupt and honest officers alike, as well as their supervisors."[50] Even in the context of suppression hearings, police perjury is almost never wholly successful. The defendant knows that the police lied. The defendant's friends, family and neighbors may well believe him when he says "I did it, but the police lied on me." Seeing members of one's community sent to prison based on solemn lies undermines belief in the very legitimacy of the law.[51] As one criminal defense lawyer asserts: "From my experience . . . the prevalent injustice in the current

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47. *See, e.g.*, Barlow, *supra* note 46, at 549; Comment, *supra* note 12, at 507; *see also* People v. McMurty, 314 N.Y.S.2d 194, 195-97 (Crim. Ct. 1970) (Younger, J.).

48. *See McMurty*, 314 N.Y.S.2d at 195-96. In *McMurty*, Judge Irving Younger summarized the problem of dropsy testimony as follows:

> Were this the first time a policeman had testified that a defendant dropped a packet of drugs to the ground, the matter would be unremarkable. The extraordinary thing is that each year in our criminal courts policemen give such testimony in hundreds, perhaps thousands, of cases—and that, in a nutshell, is the problem of "dropsy" testimony.

*Id.*

49. Younger, *The Perjury Routine*, *supra* note 13, at 596.

50. MOLLEN COMMISSION, *supra* note 5, at 40; *see also, e.g.*, Rudovsky, *supra* note 15, at 482 (describing confidence by LAPD officers that bragging about beating of Rodney King over police computer system would result in no punishment); Patton, *supra* note 15, at 780 (asserting that "[i]f the upper ranks do not enforce violations of department policy, there will be no curb on officers' misconduct"); *2 More Arrested in N.Y. Police Brutality Case*, L.A. TIMES, Aug. 19, 1997, at A19 (" '[P]olice officers are alleged to have committed an act of almost incomprehensible depravity within a police precinct and with the apparent expectation that they would get away with it.' "); Judy Rakowsky, *Jury Finds Police Killed Inmate*, BOSTON GLOBE, Mar. 9, 1996, at 1 (quoting attorney for family of killed prisoner: " '[O]fficers know they could go out and violate people's constitutional rights and then the chief will back them up.' ").

51. *See* Joe Sexton, *Jurors Question Honesty of Police*, N.Y. TIMES, Sept. 25, 1995, at B3.

process does . . . harm by further lessening respect for the law, not just in the criminal defendants, but also in friends, family, witnesses, and spectators. The lessons are communicated to all . . . who are touched by the process."[52]

There is evidence that Justice Brandeis's famous prediction in *Olmstead v. United States*,[53] has come true. In that case, he wrote: "To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution."[54] Seven decades later, the Mollen Commission noted that "[m]any law enforcement officials . . . believe that police falsification has led to a rise in acquittals because juries increasingly suspect and reject police testimony."[55] Perjury committed to enforce the law, then, paradoxically may ultimately lead to the acquittal of the guilty.

### C. *The Blue Wall of Silence and Police Perjury*

Another form of perjury is caused by the nature of police culture. Commentators have indicated that "closed groups," like police departments, often develop unwritten rules which dictate appropriate conduct in different circumstances.[56] Professors Jerome Skolnick and James Fyfe posit that all occupational groups at some point develop particular norms and values which are sculpted by that group's experiences.[57] "[A] specific world of work is rather like a game: One has to know the rules in order to play properly."[58] Groups may develop values which "are mandates peculiar to and appreciated only by members" in response to unique circumstances.[59] The police are an example of such a group. Ac-

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52. John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293, 326 (1980).

53. 277 U.S. 438 (1928).

54. *Id.* at 485 (Brandeis, J., dissenting).

55. MOLLEN COMMISSION, *supra* note 5, at 39; *see also* N.Y.C. COMMISSION ON HUMAN RIGHTS, BREAKING THE US V. THEM BARRIER: A REPORT ON POLICE/COMMUNITY RELATIONS at iv (1993) (recommending appointment of a special prosecutor "to enhance the faith of New York City communities in the prosecution of police misconduct and corruption"); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995); Clifford Krauss, *Poll Finds Lack of Faith in Police*, N.Y. TIMES, June 19, 1994, at A1 (noting poll results showing disbelief of police).

56. *See* MAURICE PUNCH, CONDUCT UNBECOMING 155 (1985); SKOLNICK & FYFE, *supra* note 15, at 90.

57. *See* SKOLNICK & FYFE, *supra* note 15, at 90.

58. *Id.*

59. *Id.*

cording to Skolnick and Fyfe, "[t]he fundamental culture of policing is everywhere similar, which is understandable since everywhere the same features of the police role—danger, authority, and the mandate to use coercive force—are everywhere present. This combination generates and supports norms of internal solidarity, or *brotherhood.*"[60]

The experience of danger and authority may contribute to the creation of a police code of silence.[61] The combination of the two creates a volatile environment in which the police may develop values at odds with those of the larger society. As these features of the police role are incorporated into officers' underlying values and ideals, the end result may be a cultural matrix which entails "a banding together, a cover-up, a conspiracy of silence."[62] This facet of police culture, at least in the eyes of the culture's members, provides protection. Such a close-knit camaraderie becomes the foundation for personal security in a hazardous, and even life-threatening day-to-day line of work, where officers rely upon their companions for protection.[63] Even otherwise honest officers, in the face of another's misconduct, may look the other way due to the enormous pressure to maintain silence, and may even commit perjury in an attempt to conceal the misconduct from courts, prosecutors, and the public.[64]

The nature of the work of the police itself may also contribute to a code of silence. There exist strong pressures upon the police from the public, the media, and the courts to provide society with exceptional protection in often dangerous situations, while at the same time conducting themselves with the utmost honesty and trustworthiness.[65] In addition, po-

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60. *Id.* at 92; *see also* KNAPP COMMISSION, *supra* note 19, at 6 (reporting that one of the factors which gives rise to unique police loyalty is exposure to danger); Patton, *supra* note 15, at 763 (" 'The code of silence that exists in every profession is even stronger among police officers out of necessity. You depend on each other in life and death situations. This brotherhood/camaraderie is a strong influence. . . .' ") (quoting Telephone Interview with Frank Saunders, California-based expert witness and former police officer who has testified at over 500 trials (Jan. 25, 1992)) (omission in original).

61. *See* SKOLNICK & FYFE, *supra* note 15, at 90.

62. *Id.*

63. *See* MOLLEN COMMISSION, *supra* note 5, at 53 ("[T]he loyalty ethic is particularly powerful in crime-ridden precincts where officers most depend upon each other for their safety each day . . . .").

64. *See id.*

65. *See* Comment, *supra* note 12, at 514-16; *All Things Considered, Blue Wall of Silence*, *supra* note 15 (noting that police officers "often see themselves as a unique corps doing a dangerous job for an uncaring public that doesn't really understand them"). In the context of dropsy-type circumstances of police perjury, the *Georgetown Law Journal* study of perjury in dropsy cases found that factors which motivate police behavior include, *inter alia*, citizen pressure on the police and

lice often feel that the media is quick to criticize their behavior,[66] and may even hinder their ability to perform their job.[67] Thus, "dilemmas in producing satisfactory work—owing to pressure for results, ambiguous legislation, vulnerability to legal sanctions, and precarious bargains with criminals, informants, and lawyers—can lead to short-cut methods, lies, covering-up, falsification of evidence, and intimidation of suspects."[68]

These circumstances may lead officers to feel a strong sense of identity with their police culture.[69] This, coupled with the closed nature of the culture, the resentment of police by the public,[70] the dangers and volatility of police work, and officers' dependance upon one another for mutual safety,[71] spawns a strong loyalty on the part of police officers to each other.[72] Although a loyalty ethic in the abstract may not necessarily result in corruption and a code of silence, group loyalty in the context of the unique aspects of police socialization "makes allegiance to fellow of-

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goals set by what the public expects and by what the police consider to be necessary for continued authority. *See* Comment, *supra* note 12, at 514-16.

66. *See* POLICE STRATEGY NO. 7, *supra* note 15, at 16-17.

67. *See, e.g., id.* at 22 (noting that 82.4% of police officers responding to NYPD survey indicated that they disagree with the proposition that the media helps the police do their job).

68. PUNCH, *supra* note 56, at 3.

69. *See* Possley & Martin, *supra* note 18, at 1 (noting that officers may consider peers "family"); *All Things Considered, Blue Wall of Silence*, *supra* note 15 (asserting that the "[p]olice tend to socialize together outside of work more than other professions").

70. *See* MOLLEN COMMISSION, *supra* note 5, at 52 (asserting that members of the public resent the police interfering with their activities). This notion has been recognized in New York by the Knapp Commission report as well, prepared two decades before the Mollen Commission report, in response to a series of news article appearing in the *New York Times* alleging widespread police corruption and laxity in handling such corruption. *See* KNAPP COMMISSION, *supra* note 19, at preface & 6. The Knapp Commission reported that "[n]obody, whether a burglar or a Sunday motorist, likes to have his activities interfered with. As a result, most citizens, at one time or another, regard the police with varying degrees of hostility." *Id.* at 6.

71. *See, e.g.*, Patton, *supra* note 15, at 763 (police officers depend on each other in life and death situations).

72. *See* MOLLEN COMMISSION, *supra* note 5, at 52; KNAPP COMMISSION, *supra* note 19, at 6. Clifford Krauss has identified two separate factors which contribute to intense police loyalty: the stress of long hours and brutal crimes. *See* Krauss, *supra* note 18, at B1. Intense loyalty has been recognized as a barrier to information in various contexts. Probably the most well known context entailing the most intense form of loyalty is the Mafia oath of silence known as "omerta." *See* United States v. Gotti, 171 F.R.D. 19, 52 (E.D.N.Y. 1997); *see also* Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 78 (1995); Sara Jankiewicz, Comment, *Glasnost and the Growth of Global Organized Crime*, 18 HOUS. J. INT'L L. 215, 222 & n.42 (1995). Intense loyalty has spawned codes of silence among prisoners as well. *See* United States v. Abel, 469 U.S. 45, 47 (1984); Schlup v. Delo, 912 F. Supp. 448, 453 (E.D. Mo. 1995); People v. Griffith, 634 N.E.2d 1069, 1072-73 (Ill. 1994). Other contexts include loyalties based upon friendships, blood relationships, ethnic ties, or gang membership, and even allegiance of corporate employees to their company. *See, e.g.*, Richman, *supra*, at 78-79.

ficers—even corrupt ones—more important than allegiance to the Department and the community. When this happens, loyalty itself becomes corrupt and erects the strongest barriers to corruption control: the code of silence and the 'Us vs. Them' mentality."[73] Thus, an unswerving loyalty can lead to the perpetuation of corruption and a code of silence within a department.[74]

Officers' exposure to the loyalty ethic and the code of silence can occur as early on as the officer's attendance at the police academy.[75] The practice of affirmatively teaching a code of silence early in an officer's career assists in deeply rooting this mentality within the culture.[76]

Once a code of silence is ingrained in a police department's cultural matrix, it may be difficult to eradicate. According to the Mollen Commission report, often even otherwise honest officers who may not approve of the code of silence will nevertheless reluctantly heed its mandates.[77] The Mollen Commission report indicated that honest officers deplore corruption and even wish that corrupt officers would be caught, but are handcuffed in taking any action because of the code of silence.[78]

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73. MOLLEN COMMISSION, *supra* note 5, at 53. According to the Mollen Commission, the "Us vs. Them" mentality consists of the notion that officers sometimes view the public as the "enemy." *Id.* at 58.

74. *See* MOLLEN COMMISSION, *supra* note 5, at 51. The Mollen Commission report asserts that these aspects of police culture "encourage corruption by setting a standard that nothing is more important than the unswerving loyalty of officers to one another." *Id.* In addition, "these attitudes thwart efforts to control corruption. They lead officers to protect or cover up for others' crimes . . . ." *Id.* at 51-52; *see also* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 211 (1967) ("Whenever a number of dishonest officers are tolerated by other officers within a police organization, an atmosphere of mutual support and protection may develop, and eventually it may taint the entire police system.").

75. *See* MOLLEN COMMISSION, *supra* note 5, at 55; *see also* Sharp v. City of Houston, 960 F. Supp. 1164, 1174 (S.D. Tex. 1997) (allegations by police officer in claim against city that "custom" included code of silence indicated by, *inter alia*, training in police academy that officers shall not report and shall cover-up misconduct); Patton, *supra* note 15, at 780 (suggesting that field training officers can have a tremendous influence in establishing rookie officers' compliance with "unwritten" department policies); *Serpico: Pattern of Lies Lingers*, *supra* note 15, at 9A (quoting Frank Serpico: " '[the "brotherhood of lies"] is a system in which the cops learn to lie for each other, right from the start, right out of the (police) academy' "); Watson, *supra* note 15, at M5 (noting that rookie officer who participated in Rodney King beating probably would not have engaged in the activity if his training officer had not implicitly shown his approval through silence). *But see* Kocieniewski, *supra* note 4, § 1, at 1 (noting changes in New York City police Department cadet training to root out police perjury and deception); *Teach Lies? Angry Cop Denies it*, ARIZONA REPUBLIC, Mar. 16, 1995, at A2 (former Los Angeles police chief Willie Williams denies that officers are taught to lie in police academy).

76. *See* Young, *supra* note 13, at 467 (asserting that "[s]enior police officers teach new officers that lying is one of the basic principles of policing").

77. *See* MOLLEN COMMISSION, *supra* note 5, at 57.

78. *See id.*

This is so, according to the Mollen Commission, because of the Draconian consequences attached to violating the code of silence: "Officers who report misconduct are ostracized and harassed; become targets of complaints and even physical threats; and are made to fear that they will be left alone on the streets in a time of crisis."[79]

Knowing that if one breaches the code of silence one may experience ostracism and harassment by his or her peers, officers may overlook peer misconduct, and, more importantly, may even lie about such misconduct to superiors, the public, and the courts. In the event officers fear even more extreme consequences of breaching the code of silence, the incidence of code of silence perjury where the necessity arises becomes a strong possibility.

As a consequence of the code of silence, in cases involving allegations of police misconduct, such as excessive force or brutality, courts may hear boilerplate testimony by police to conceal or justify their malfeasance or that of a fellow officer. Professor Alan Dershowitz has claimed that he has "read dozens of transcripts of such boilerplate police testimony."[80] Such police testimony, according to Professor Dershowitz, may often be akin to the following:

> We attempted to place the perpetrator under arrest, . . . but he began to swing wildly at the officers. I tried to place him in handcuffs, . . . but he started to reach into his jacket for what I believed to be a weapon. When I grabbed his hands in order to prevent him from reaching for a weapon, he began to kick in every direction, hitting his legs against the side of the police car and other hard objects.
>
> At this point, he fell to the ground and started to bang his head and body against the pavement. We attempted to subdue him because we were concerned that he would hurt himself. He was strong and it took us several minutes to subdue him . . . . All of his injuries, and ours as well, were sustained as a result of his resistance and our efforts to subdue him.[81]

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79. *Id.* at 53; *see also* CHRISTOPHER COMMISSION, *supra* note 15, at 170 (finding that officers who give evidence of misconduct against fellow officers are often harassed, ostracized, and become the targets of complaints); Rudovsky, *supra* note 15, at 487 (asserting that experienced officers in Boston will not volunteer for Internal Affairs Division assignments "unless they are promised the ability to choose their next assignment 'because they fear retribution once they [go back on the street]' ") (quoting REPORT OF THE BOSTON POLICE DEPARTMENT MANAGEMENT REVIEW COMMITTEE 124 (Jan. 1992) (alteration in original)); Possley & Martin, *supra* note 18, at 1 (noting officers' fears of ostracism by those considered "family").

80. Alan Dershowitz, *A Police Badge is Not a License to Commit Perjury*, SAN DIEGO UNION-TRIB., Apr. 4, 1991, at B11.

81. *Id.*; *see also* Rudovsky, *supra* note 15, at 481. In a malicious prosecution and wrongful arrest charge, an officer may justify arrest through fabricating evidence of assault on the officer. *See id.* Because of the code of silence, other officers would testify either that they did not observe the incident or confirm the fabrication and testify that the arresting officers acted properly in self-defense. *See id.*

According to Professor Dershowitz, all of the officers involved parrot the bogus testimony, and the judge "shakes his head in knowing frustration, but accepts the officers' account as credible."[82]

Although this type of police perjury is similar to dropsy testilying, it represents a more blatant variety of perjury, through which officers embrace outright lies, manufacture evidence, and falsify documents to conceal police abuses or corruption in various forms.[83] The Mollen Commission found that "corruption-cover" falsity was typically used by officers who engaged in activities such as unlawful raids on drug houses, where the officers would steal money or drugs and justify the raids by manufacturing evidence of tips by unidentified informants.[84] Police created false

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82. Dershowitz, *supra* note 80, at B11.

83. *See* MOLLEN COMMISSION, *supra* note 5, at 37; Tarlow, *supra* note 18, at C2. Code of silence testimony is distinguishable from dropsy testimony in that the former implicates a form of corruption not necessarily implicated by the latter. The code of silence involves an implicit or explicit understanding between officers to protect each other through cover-up and even through aid in corrupt activities. Thus, "[t]he code of silence does more than prevent testimony. It mandates that no officer report another for misconduct, that supervisors not discipline officers for abuse, that wrongdoing be covered up, and that any investigation or legal action into police misconduct be deflected and discouraged." Rudovsky, *supra* note 15, at 487.

Dropsy testimony, on the other hand, may merely be the product of one officer's attempt to achieve "justice" in the face of clear criminal activity—in dropsy cases, the presumption is that the suspect actually possessed drugs, but that the drugs were discovered through illicit means. Therefore, an officer may have idealistic motives behind her impropriety: lying for the public good, *see* Young, *supra* note 13, at 463-64, or to achieve " 'legitimate' law enforcement ends." MOLLEN COMMISSION, *supra* note 5, at 38. This does not mean that dropsy-type testimony cannot be the result of corruption throughout a police department. In his book *Conduct Unbecoming*, Maurice Punch indicated that the word "corruption" is used to refer to "both *profiting* in some way from abuse of power and the *abuse of power* itself." PUNCH, *supra* note 56, at 12-13. Punch includes falsification of testimony in one of his four categories of corruption—"Combatative (Strategic) Corruption"—pursuant to which officers " 'build[] a case' in which the major goal is to make arrests, obtain convictions, confiscate drugs, and get long sentences for criminals," by "using illicit means for organizationally and socially approved ends." *Id.* at 13 (emphasis and citation omitted). Punch includes "lying under oath" in his fourth category of corruption, called "Corruption as Perversion of Justice." *Id.* at 14. Punch indicated that this category implicates police officers' "motive . . . to use one's power and position to ensure that justice does or does not get done." *Id.* This involves "a policeman or group of policemen who conspire to take revenge on someone or to avoid prosecution themselves." *Id.* Thus, the more corrupt a department, the more likely it is that there will be incidence of dropsy testimony or other forms of testilying. *See, e.g.*, MOLLEN COMMISSION, *supra* note 5, at 36. Moreover, in a circumstance where multiple officers are present during the shakedown of a suspect, in order for the dropsy testimony to succeed, the officers must conspire to stick to the same story. Therefore, although dropsy-type testimony does not necessarily implicate a code of silence or pervasive, department-wide corruption, it may often involve such underlying forces, and may even be the product of them. Finally, idealistic rationalizations behind police testilying or falsifications often fuels other types of corruption. *See id.* at 39. Some corrupt officers reported to the Mollen Commission "that their corrupt activities began from motives they believed to be legitimate." *Id.*

84. *See* MOLLEN COMMISSION, *supra* note 5, at 37.

excessive force claims by simply adding bogus charges of resisting arrest to their arrest reports, and sticking to the stories at trial.[85] In both instances, where more than one officer was involved in the wrongful conduct or present at the scene, the officers would agree upon a common false tale, and use that tale in complicity to justify the actions.

Although explicit agreements to fabricate between officers may exist in these types of situations, officers may unilaterally decide to lie. As one officer lies to conceal her own impropriety, others who may have witnessed the actions of their fellow officer or who may have first-hand knowledge of such misconduct may engage in a variety of deceptive behaviors. For example, in the situation of paradigmatic dropsy testimony, a fellow officer who witnessed the incident may simply remain silent. If questioned by her superiors, the fellow officer may confirm the bogus story. If called to testify in court about the actions, the officer may even perjure herself to protect her fellow officer. There may be any number of reasons why an officer would go to such lengths to protect a fellow officer where the latter has clearly violated the suspect's constitutional rights, but a common and compelling one is the overwhelming pressure placed upon the officer to heed to the police code of silence. Thus, testilying such as that committed to cover up a fellow officer's malfeasance may commonly be, to a large extent, a function of the existence and strength of the code of silence within a particular department or precinct.

## III. The Justice System's Failure to Respond to Police Perjury

In at least some cases, police perjury leads to erroneous acquittals, erroneous convictions, and a general decrease in respect for law. Police, prosecutors, courts, and other participants in the criminal justice system might well be expected to make elimination of police perjury a top priority, as a matter of principle, for utilitarian reasons, or both. For a variety of reasons, however, it has not worked out that way; no branch of government has proven effective in controlling perjury.

### *A. Retaliation Against Officers Who Violate The Blue Wall Of Silence*

> Cops don't tell on cops. And if they did tell on them, just say if a cop decided to tell on me, his career's ruined. He's going to be labeled as a rat. So if he's got fifteen more years to go on the job, he's going to be miserable because it follows you wherever you go. . . . [H]e's going to have nobody to work with. And chances

85. *See id.*; *see also supra* notes 80-82 and accompanying text discussing the operation of excessive force perjury at trial.

are if it comes down to it, they're going to let him get hurt.[86]

In many police departments, the code of silence carries with it a self-enforcement mechanism which ensures that officers will not break the code: officers who violate this code may be subject to harsh reprisals. Evidence that the code of silence exists in a particular department, without more, does not necessarily indicate that police officers will lie when an occasion to do so arises. Evidence of real and substantial retaliation in a particular department, on the other hand, could reasonably give rise to an inference that police witnesses subject to the code of silence may be tempted to lie in court to protect fellow officers and their own status in the department when truthful testimony might implicate a fellow cop. Enforcement through retribution strengthens and perpetuates the code of silence, intensifying the deterrent effect on officers who may be otherwise willing to tell the truth.

The evidence of retaliation in many police departments is well documented. For example, the Mollen Commission reported several instances of harassment and ostracism experienced by officers as a result of breaching the code of silence. The classic retaliatory behavior by officers within a department against a code violator is to label the perpetrator a "rat" or a "snitch."[87] This label may travel with the officer, even after transfer to a new unit.[88] Various other forms of ostracism and harassment by fellow officers typically accompany the label.[89] The different forms may emerge at various extremes. For example, one officer testifying before the Mollen Commission indicated that officers who break the code of silence are "held away," "pushed off to one side," and "kept away from the rest of the group."[90] Testimony presented to the Christopher

86. MOLLEN COMMISSION, *supra* note 5, at 53-54 (quoting the testimony of Bernard Cawley, former New York City police officer).

87. *See id.* at 53-56; Knight & Weiser, *supra* note 18, at B1; *see also* White-Ruiz v. City of New York, No. 93-CIV.-7233 (DLC) (MHD), 1996 WL 603983, at *2 (S.D.N.Y. Oct. 22, 1996) (discussing label of "rat" and "cheeseater" for officer reporting theft of money by fellow officer from body of deceased person at a crime scene).

88. *See* MOLLEN COMMISSION, *supra* note 5, at 54-55 (quoting testimony of officer Kevin Hembury).

89. *See* Knight & Weiser, *supra* note 18, at B1 (noting commendation by then D.C. police chief Maurice Turner of officer for enduring ostracism and harassment from other members of department for reporting assault by a colleague upon a defenseless suspect).

90. MOLLEN COMMISSION, *supra* note 5, at 54 (quoting testimony of Lieutenant Robert McKenna). An example of the powerful effect of this type of ostracism was detailed in the Mollen Commission report. *See id.* at 55. A former police officer recruit who experienced sexual harassment by an academy instructor reported the conduct to the Internal Affairs Division. *See id.* Despite assurances to the recruit of confidentiality, Internal Affairs reported the complaint to the recruit's supervi-

Commission in Los Angeles exhibited more extreme ostracism: one officer indicated that he was forced out of the police department for corroborating a suspect's report of being beaten in a holding cell; another officer indicated that breaking the code of silence "will mark the end of [an officer's] career."[91]

The Mollen Commission reported even more threatening examples of retaliatory activity and harassment as a result of the code of silence. In one instance, a police supervisor who disciplined his subordinates for misconduct and reported acts of corruption had to be relocated thirty-eight times.[92] According to the Mollen Commission, "[i]n almost every case, on the very day [this police supervisor] arrived to report for duty at his new command, he found evidence that his reputation had preceded him. At one command, his locker was burned; at another, his car tires were slashed; at another, he received threats of physical harm."[93] In another instance, a detective who served in the Internal Affairs Division was transferred to a precinct detective squad; in his first week on the job, his colleagues "placed dead rats on his car windshield, stole or destroyed his personal property, and told him directly that he could not count on them in times of danger."[94]

These threats evince the possible imposition of physical harm to an officer as a result of breaking the silence.[95] Indeed, a 1993 focus group

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sors. *See id.*

> Within days, she was ostracized by her fellow recruits (even those who had been her friends) and Academy personnel. Her isolation was made so complete that she was forced to finish her Academy training on her own. When she graduated, the Department assigned her to Internal Affairs because it was unlikely she would be accepted anywhere else in the Department. Her dream to become a cop became a nightmare because she made a single complaint about a fellow cop. Within a year, she resigned from the Department.

*Id.*; *see also* Cowles Publ'g Co. v. State Patrol, 748 P.2d 597, 599 (Wash. 1988) (en banc) (relating testimony of police psychologist which indicated that "stress, aggravation, and humiliation [is] visited upon the families of officers who complained against colleagues").

91. CHRISTOPHER COMMISSION, *supra* note 15, at 170; *see also* Bradley v. Fisher, 688 A.2d 527, 529 (Md. Ct. Spec. App. 1997) (in action for wrongful discharge of police officers, officers allege they were fired for refusing to obey illegal orders and for reporting chief's activities to others); Raab, *supra* note 8, at 6 (quoting an anonymous New York City cop: "If they mark you as a 'rat,' you're finished on the job.").

92. MOLLEN COMMISSION, *supra* note 5, at 54.

93. *Id.*

94. *Id.* at 55.

95. *See, e.g.*, White-Ruiz v. City of New York, No. 93-CIV.-7233 (DLC) (MHD), 1996 WL 603983, at *2 (S.D.N.Y. Oct. 22, 1996) (discussing allegations by police officer of fellow officers' refusal to provide back-up in dangerous situation and interference with radio transmission requesting such back-up); Domenech v. City of New York, 919 F. Supp. 702, 705 (S.D.N.Y.) (discussing allegations by officer that fellow officers "told her that if she ever called in as an 'officer in trouble,' no-

body would respond"), *on reargument*, 927 F. Supp. 106 (S.D.N.Y. 1996); Raab, *supra* note 8, at 6 (quoting an anonymous New York City police officer: "If they mark you as a 'rat' . . . no one talks to you, . . . your family gets obscene calls and every day you have to wonder if someone is going to be a little slow in backing you up in a life or death situation."). One commentator reported that:

> Cops traditionally don't tell on other cops. They fear retaliation, sometimes violence, against themselves and their families if they say anything about a fellow officer. There's a virtual certainty that they'll be ostracized by their colleagues and a real possibility that needed police backup in a life-threatening situation might be slow to come.

*Savagery at a Police Station as Vicious an Attack as Anyone Could Imagine*, THE RECORD (Northern N.J.), Aug. 17, 1997, at 2. A vivid example of this extreme of the code of silence is evinced in *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988) (Posner, J.). In *Jones*, an individual wrongfully charged with murder and other crimes brought claims against the city and several police officers for false arrest, false imprisonment, and conspiracy. *See id.* at 988. The case involved the rape and murder of a 12-year-old girl and the beating of her 10-year-old brother. *See id.* The boy was questioned by the police, and the police obtained equivocal evidence that the plaintiff was the perpetrator. *See id.* The plaintiff was arrested and placed in jail pending trial, as his family was unable to afford bond. *See id.* at 989-90. A month later he was released after the court reduced the bond to a level that the plaintiff's family could afford. *See id.* at 990.

Six days after the plaintiff was arrested, however, additional evidence came to the attention of Detective Laverty of the Chicago Police Department, and he investigated. *See id.* Detective Laverty was assigned to the case while the original two officers assigned were away. *See id.* Pursuant to the investigation, Detective Laverty discovered that the police had arrested the wrong person, and he relayed this discovery to his superiors. *See id.* When the two officers originally assigned to the case found out about Detective Laverty's discoveries, they became furious. *See id.* They confronted Detective Laverty, "told him that he was messing up their case, and threatened to destroy his career if he continued to 'interfere.' " *Id.* Detective Laverty indicated to the officers that if the case went to trial he might testify for the plaintiff. *See id.* at 990-91. One of the officers "threatened to 'blow him away' if he did." *Id.* at 991.

Detective Laverty received no cooperation from his superior officer upon revealing the problem to him. *See id.* at 990-91. Moreover, Detective Laverty's superior pretended to take appropriate steps to remedy the problem, when in fact he did nothing, and even conspired with the other officers to conceal his inaction. *See id.* at 993. Ultimately, Detective Laverty discovered that the case was in fact set for trial, and relayed the exculpatory information to the plaintiff's lawyer. *See id.* at 991. The court declared a mistrial, and all charges against the plaintiff were dropped. *See id.*

Subsequently, Detective Laverty experienced retaliation for his actions. *See id.* The police department charged him in disciplinary proceedings with failing to inform the state's attorney of his plan to testify for the plaintiff at the trial. *See id.* Moreover, the department transferred him from the detective division "to a series of menial tasks culminating in the monitoring of police recruits giving urine samples." *Id.*

The actions by fellow officers and superiors against Detective Laverty illustrate the potential repercussions of violating the code of silence, particularly the threat of murder by Laverty's fellow officers. Some commentators recognize this form of the code's severity, and even equate it to the Mafia's code of silence known as "omerta." *See, e.g.*, *New York Case Spotlights Police Officer 'Code of Silence,'* USA TODAY, Aug. 19, 1997, at 12A (asserting that "[t]raditional police silence to protect their own is equated to the Mafia code of silence"); Raab, *supra* note 8, at 6 (quoting Minneapolis Police Chief Anthony Bouza: " 'In New York, . . . the police code of silence is stronger than the mafia's code of omerta.' "). According to the Mafia's loyalty oath, "[d]eath is assured for the person who is or is suspected of becoming a rat." United States v. Gotti, 171 F.R.D. 19, 52 (E.D.N.Y. 1997); *see also* Jankiewicz, *supra* note 72, at 222 (" 'The foundation of the Mob was based on the idea that if a member spoke to the police, the press, or even other associates about his criminal dealings, he would sleep with the fishes.' ") (quoting T.J. English, *La Cosa Nostra Takes*

study conducted by the Internal Affairs Bureau of the New York Police Department reported that all uniformed levels of the force feared life-threatening retaliation for defying the code:

> [L]arge majorities of the police officers interviewed said that they would not report the corrupt acts of fellow officers to Internal Affairs, even anonymously, [because] . . . [b]eing labeled a "rat" may incur the ultimate price: loss of one's life in a conflict with criminal suspects because other officers would be reluctant to respond in support.[96]

The possibility of direct, physical danger to officers who breach the code of silence was recognized and acted upon by officials in New York in August of 1997, in the wake of the 70th Precinct Brooklyn torture case.[97] In that incident, in what has been deemed by some as "an act of almost incomprehensible depravity[,]"[98] a Haitian immigrant was allegedly beaten and sodomized with a wooden stick inside the 70th Precinct station house.[99] In a response more reminiscent of cases involving mafia informants than police officers, the city placed the officers who came forward, and their families, under armed guard to protect against retaliation by fellow officers.[100]

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*the Big Hit*, PLAYBOY, Sept. 1992, at 91)). Jerome Skolnick and James Fyfe argue, however, that "the police code of silence is not a mafia-style life-or-death pact with the devil[.]" SKOLNICK & FYFE, *supra* note 15, at 110. Rather, Skolnick and Fyfe recognize that the code "typically is enforced by the threat of shunning, by fear that *informing* will lead to exposure of one's own derelictions, and by fear that colleagues' assistance may be withheld in emergencies." *Id.* In contrast to this position, the Brooklyn 70th Precinct torture case seems to support the notion that police who break the code should fear that they have placed themselves in physical danger, possibly life-threatening danger. *See supra* notes 24-27 and accompanying text. In that instance, the two officers who broke the code of silence to report the misconduct of their colleagues, along with their families, had to be placed in protective custody. *See infra* notes 97-100 and accompanying text.

96. POLICE STRATEGY No. 7, *supra* note 15, at 20-21.

97. *See supra* notes 24-27 and accompanying text.

98. *2 More Arrested in N.Y. Police Brutality Case*, *supra* note 50, at A19.

99. *See id.*

100. *See* Barry, *2d Police Officer Charged in Attack on Arrested Man*, *supra* note 24, § 1, at 1; Bone, *supra* note 27, at 11; *Brutality in the Precinct; N.Y.P.D.'s Reputation Soiled by the Code of Silence*, *supra* note 27, at A8; Cooper, *supra* note 15, at B3; John Kifner, *Charges of Brutality: The Overview; Thousands March to Protest Police*, N.Y. TIMES, Aug. 17, 1997, at § 1, at 1; Paul Schwartzman, *2d Cop Held in Torture Case*, DAILY NEWS (New York), Aug. 16, 1997, at 3; Frank Serpico, *Setting the Tone for Police Reform*, N.Y. TIMES, Aug. 30, 1997, § 1, at 23; *see also* Lewis, *supra* note 18, at L13 (quoting interview with a Manhattan police officer: "When we're out there late at night, we only have each other. . . . When a problem arises, he'd only have to turn his back. I might get blown away. Trust me, it's happened."); *News Forum*, *supra* note 25 (commenting that Officer Boria, a witness at the trial of a New York officer who applied a fatal chokehold to a suspect, had to be protected from potential harm after testifying that the suspect was not struggling, but lying motionless when the hold was applied).

Rank and file officers are not the only enforcers of the code. Harassment may even come from the upper ranks of the department in the form of improper reprimands,[101] inappropriate negative performance evaluations,[102] or retaliatory assignment changes and inappropriate post assignments.[103]

In short, in departments with a code of silence enforced through retaliation, officers could reasonably fear that breaking the code would mean that ostracism, harassment, or worse would be a routine part of their working life. Thus, in order to avoid retaliation, corrupt and honest officers alike may be tempted to lie on the witness stand, falsify documents, lie to the media and the public, and generally cover-up any and all acts or events occurring under the blue shroud which may foment the wrath of the code of silence. For these reasons, police officers are unlikely to end perjury on their own.

### *B. Prosecutorial Hesitation to Address Police Perjury*

Police criminality, including police perjury, even where guilt is clear, has not traditionally been dealt with aggressively by prosecutors.[104] The Mollen Commission, for example, noted that "several former and current prosecutors acknowledged—'off the record'—that perjury and falsifications are serious problems in law enforcement that, though not condoned, are ignored."[105] There are a number of reasons for prosecutorial disinterest. First, it is very difficult to convict a police officer for acts committed in the line of duty.[106] In a "swearing match" between a police

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101. *See* Knight & Weiser, *supra* note 18, at B1 (noting that $500 fine for operating vegetable stand in spare time was allegedly part of continuing harassment by police department of officer who broke the code of silence).

102. *See* Domenech v. City of New York, 919 F. Supp. 702, 705 (S.D.N.Y.), *on reargument*, 927 F. Supp. 106 (S.D.N.Y. 1996).

103. *See* White-Ruiz v. City of New York, No. 93-CIV.-7233 (DLC) (MHD), 1996 WL 603983, at *2 (S.D.N.Y. Oct. 22, 1996); Ariza v. City of New York, No. CV-93-5287, 1996 WL 118535, at *2 (E.D.N.Y. Mar. 7, 1996).

104. *See* Cloud, *supra* note 13, at 1313; *id.* at n.12 (collecting cases); Rudovsky, *supra* note 15, at 488; Young, *supra* note 13, at 465; *see also* Mark Curriden, *The Lies Have It*, A.B.A. J., May 1995, at 68, 71 (asserting that "[t]he pattern that actually may be developing is that hardly anyone—defendants, police, plaintiffs or witnesses—is getting caught or prosecuted for perjury"); *cf.* Dershowitz, *Some Cops Go Bad*, *supra* note 18, at 34A ("A few prosecutors have now begun to actually prosecute policemen who lie in criminal cases. But these cases are few and far between."). Prosecutors have been reluctant to bring charges against the police for other types of misconduct as well. *See* Freeman, *supra* note 17, at 724 (police brutality); Myers, *supra* note 17, at 505 (use of deadly force).

105. MOLLEN COMMISSION, *supra* note 5, at 42.

106. *See* UVILLER, *supra* note 13, at 158 ("The prosecutor can do little . . . about police bru-

officer and an individual who may have committed a crime, judges and juries will usually side with the officer.[107] Even where there is no evidence of defendant misconduct, such as in excessive force prosecutions against police, judges and juries may often retain pro-police biases.[108] Prosecutors may well be unable to rely on police witnesses, even if those officers were not participants in the alleged crime, because of the strength of the code of silence.[109]

Moreover, odd things seem to happen during prosecutions of police officers. In what probably remains the largest police corruption prosecu-

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tality or perjury."). A 1996 article in the *Los Angeles Times* reported that "often . . . prosecutors decide not to file perjury cases because they are simply too difficult to win." Newton & Simon, *supra* note 2, at A1. The article indicated that:

> Los Angeles County prosecutors decided against charging LAPD [Detective] Andrew A. Teague with perjury last fall even though they believed he falsified evidence in a murder case and then lied about it under oath. Similarly, prosecutors in Ventura County decided not to charge former LAPD Officer Theodore J. Briseno with perjury, though they concluded that he probably lied under oath during the Simi Valley trial of officers charged in the beating of Rodney G. King. Proving it beyond a reasonable doubt, they said at the time, would be "exceedingly difficult."

*Id.*; *see also* Harris, *supra* note 32, at 1774 (asserting that prosecutors will often not pursue perjury charges because of difficulty of prevailing due to lack of physical evidence and evidentiary burdens).

107. *See, e.g.*, MOLLEN COMMISSION, *supra* note 5, at 42; Cloud, *supra* note 13, at 1322-23; Dripps, *supra* note 12, at 696; Patton, *supra* note 15, at 754, 758; *see also* Freeman, *supra* note 17, at 724-25 (asserting that police brutality is extraordinarily difficult to prove because of officers' inherent credibility with juries); Harris, *supra* note 32, at 1771 (indicating that there is an increasing attitude among judges and lawyers of acceptance of and toleration for perjury). Professor Robin Magee, for one, challenges what she terms "the good cop paradigm"; the idea that the average police officer should be regarded "as a law-abiding citizen who is chiefly, if not totally, motivated by law enforcement interests when appropriate and who can be trusted to behave within constitutional parameters." Magee, *supra* note 15, at 160-61 (footnotes omitted). Magee argues that the paradigm is revealed through Supreme Court "blindness to bad cops in cases raising issues of pretext," and through the Court's deference to police judgment and allowance of discretionary authority. *Id.* at 161; *see also* Sexton, *supra* note 51, at B3 (reporting that interviews of several dozen prospective jurors in Brooklyn, Queens, and Manhattan revealed that very few people would begin their jury service with the assumption that police were going to be truthful; the reason for the distrust was attributed to police corruption).

108. *See* Montiel v. City of Los Angeles, 2 F.3d 335, 343-44 (9th Cir. 1993) (verdict for defendants on excessive force actions reversed and remanded in part due to improper statements by judge indicating pro-police bias); Osborne v. City of Long Beach, 865 F.2d 264, 1988 WL 14391, at *5 (9th Cir. Dec. 20, 1988) (noting that in a civil rights case against police officers, jurors can be expected to have natural bias in favor of defendants and against plaintiff); Cloud, *supra* note 13, at 1322-23 (noting that because police are often experienced witnesses, some judges may "believe that most defendants in the criminal justice system are guilty," and "participants in the criminal justice system may assume that as a class criminal defendants will commit perjury"); Patton, *supra* note 15, at 765 (positing that "juries almost always believe the police"); *id.* at 765-66 (asserting that plaintiff's attorney in excessive force case must overcome tremendous psychological impediments to convincing a jury that the police committed wrongdoing).

109. *See* Young, *supra* note 13, at 465.

tion of the century, bookmaker Harry Gross was to be the star witness in a trial of scores of officers accused of accepting protection money from gamblers.[110] Gross, who was cooperating with prosecutors and under police guard, mysteriously disappeared for twenty-four hours before trial.[111] He took the stand, gave his name, and refused to testify further; "[o]nly a clever legal tactician could have instructed him to stop when he did."[112] Because he was the key witness, several officers had to be released and could not be reprosecuted because of the double jeopardy bar. With a history of cases like this, it is hard not to be sympathetic to prosecutors who believe they cannot win cases with police defendants.

Prosecutors may be reluctant to prosecute police officers for other reasons. Most state prosecutors have relatively small investigative staffs; they depend on the police departments to investigate and prove their cases. Accordingly, a prosecutor sensitive to the need to maintain a good working relationship with the police department, and realizing that she cannot succeed in her job without police assistance, might reasonably hesitate to prosecute a police officer for a crime that would put a private citizen behind bars.[113] In addition, prosecutors sometimes suggest that it is the jury's job, not that of the prosecutor's office, to assess the credibility of witnesses and determine whether the witness is telling the truth.[114] While a prosecutor may not "knowingly offer false evidence,"[115] there is no ethical prohibition on introducing testimony the prosecutor firmly believes, but does not actually *know* is perjured. Finally, it is possible that some prosecutors may actually approve of police perjury, at least when it leads to the "correct" result.[116] City officials[117] and police executives[118]

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110. *See* HELFAND REPORT, *supra* note 41, at 46.

111. *See id.* at 46-47.

112. *Id.* at 47.

113. *See* 1 CHIN, *supra* note 5, at xxxv-xxxvi; KNAPP COMMISSION, *supra* note 19, at 255-56 (noting fact that prosecutors must rely on police investigators both in ordinary prosecutions and to uncover police corruption).

114. *See* Harris, *supra* note 32, at 1771.

115. ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Standard 3-5.6(a) (1978).

116. *See* Ricker, *supra* note 12, at 46 ("Prosecutors shrug when police officers offer less than credible testimony; judges sigh and turn their heads.").

117. In many cities, police departments and police unions are independent and powerful political entities. At the same time, citizens demand that the police be kept, or at least appear to be kept, under firm control. "When I go to bed at night," said former New York Mayor Robert F. Wagner, Jr., "I say a special prayer for the safety of the city. Then I say a special prayer of thanks that nothing bad happened in the police department." GEORGE ASTOR, THE NEW YORK COPS: AN INFORMAL HISTORY 5 (1971). Mayor Wagner may have recognized that police scandal represented political disaster; none of the mayors sitting when police scandals leading to the appointment of police investi-

have likewise not always proved to be aggressive in dealing with police perjury.

### C. *Judicial Responses to Police Perjury*

Courts are understandably reluctant to place police witnesses in the same disfavored class as accomplices, drug addicts, or perjurers when it comes to weighing credibility.[119] Courts have consistently rejected defense requests for both instructions that require the court to inform the jury that "in weighing the testimony of police officers, greater care should be exercised than in weighing the testimony of other witnesses, because of their material bias [and] prejudice,"[120] and instructions that indicate in some way that the testimony should be "scrutinized with especial caution."[121] What is more surprising is that even in cases where

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gation commissions were reelected. *See* 1 CHIN, *supra* note 5, at xxxii.

118. For example, when New York City police officers were discovered to have engaged in systematic perjury, "some ranking commanders argued that officers should not be prosecuted. Police tradition, they said, allowed otherwise honest officers to occasionally 'shade' their testimony by changing details of arrests to conform with search and seizure laws." Kocieniewski, *supra* note 4, § 1, at A1.

119. Language requiring a jury to view testimony with suspicion, sometimes called a "cautionary tail," commonly appears in jury instructions regarding the credibility of informants, immunized witnesses, accomplices, and convicted perjurers. *See* 1 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS §§ 15.02-15.04, 15.10 (4th ed. 1992); *see also* 1 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS, CRIMINAL ¶ 7.01[1], at 7-10 (1996) [hereinafter SAND ET AL., CRIMINAL] (discussing evaluation of the credibility of a witness with interest in outcome); 1 *id.* ¶ 7.01[1], at 7-27 (discussing evaluation of the credibility of an unindicted coconspirator); 1 *id.* ¶ 7.01[1], at 7-33 ("informally immunized witness"); 1 *id.* ¶ 7.01[1], at 7-37 ("witness using or addicted to drugs"); 1 *id.* ¶ 7.01[3], at 7-61 ("government informers"); 4 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS, CIVIL ¶ 76.01[1], at 76-12 (1997) [hereinafter SAND ET AL., CIVIL] ("witness with interest in outcome"); 1 *id.* ¶ 76.01[1], at 76-23 (discussing evaluation of the credibility of a witness who has previously committed perjury). *But see* COMM. ON MODEL CRIMINAL JURY INSTRUCTIONS WITHIN THE EIGHTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 4.04 cmt., at 97 (1996) [hereinafter MODEL CRIMINAL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT] (indicating that the Eighth Circuit "has criticized the use of a 'cautionary tail' as an unwarranted intrusion into the jury's functions," and recommending against its use).

120. Lovings v. State, 62 N.W.2d 672, 676 (Neb. 1954).

121. People v. McMurty, 314 N.Y.S.2d 194, 197 (Crim. Ct. 1970); *see, e.g.*, United States v. Arthur, 822 F.2d 60, 1987 WL 37871, at *3 (6th Cir. June 30, 1987) (per curiam); United States v. Ovimette, 798 F.2d 47, 49 (2d Cir. 1986); Bush v. United States, 375 F.2d 602, 604 (D.C. Cir. 1967); United States v. Paccione, 224 F.2d 801, 803 (2d Cir. 1955); *Lovings*, 62 N.W.2d at 676; *see also* Golliher v. United States, 362 F.2d 594, 604 (8th Cir. 1966) (decision to submit cautionary jury instruction regarding police testimony is within discretion of trial judge; no error where judge fails to so instruct); Hronek v. People, 24 N.E. 861, 863 (Ill. 1890) (instruction that evidence of police "should be received with a large degree of caution" was incorrect proposition of law); People v. Burgos, 614 N.E.2d 59, 66 (Ill. App. Ct. 1993) (holding that refusal to give non-Illinois pattern jury

there is reason to be suspicious of particularly troubling sub-categories of police testimony, courts still hesitate to act.

### *1. Bush v. United States*[122]

The starting point in analyzing the treatment of police testimony by courts is then-Judge Warren Burger's oft-quoted statement in *Bush v. United States*: "[I]t would be a dismal reflection on society to say that when the guardians of its security are called to testify in court under oath, their testimony must be viewed with suspicion."[123]

The defendants in *Bush* were convicted of possession and transferring narcotics.[124] They argued on appeal that the court "should adopt a rule that the jury must be instructed that the uncorroborated testimony of a police narcotics officer must be viewed with suspicion and acted upon with caution."[125] Narcotics officers are, of course, subject to special temptations and pressures of various kinds. The court noted that although some types of witnesses should be subject to a cautionary instruction, such as accomplices and informants,[126] it would be "anomalous" to in-

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instruction tendered by defendant that police testimony should be judged in same manner as other witnesses is within sound discretion of trial judge where an Illinois pattern jury instruction adequately addresses the issue); State v. Braathen, 43 N.W.2d 202, 216 (N.D. 1950) (where testimony of police officer discloses no prejudice or bias, no error to refuse to grant cautionary jury instruction); State v. Hamrick, 236 S.E.2d 247, 249 (W. Va. 1977) (asserting that "[t]he reverse of the *Bush* proposition is also true; police officers' testimony is not accorded *greater* weight than other witnesses' evidence"); *cf.* United States v. Reid, 410 F.2d 1223, 1227-28 (7th Cir. 1969) (prejudicial error where jury instructed on defendant's possible interest, prejudice, or bias, without being instructed that government witnesses not entitled to special credibility).

122. 375 F.2d 602 (D.C. Cir. 1967).

123. *Id.* at 604.

124. *See id.* at 603-04.

125. *Id.* at 604.

126. *See, e.g.*, Hoffa v. United States, 385 U.S. 293, 312, n.13-14 (1966) (approving cautionary "interested witness" instruction); United States v. Lord, 907 F.2d 1028, 1029-1031 (10th Cir. 1990) (immunized witness); United States v. Olmstead, 832 F.2d 642, 646 (1st Cir. 1987) (accomplice); United States v. Cresta, 825 F.2d 538, 546 (1st Cir. 1987) (informant); United States v. Bernal, 814 F.2d 175, 183-85 (5th Cir. 1987) (accomplice); United States v. Bowman, 798 F.2d 333, 335-36 (8th Cir. 1986) (immunized witness); United States v. Beard, 761 F.2d 1477, 1481 (11th Cir. 1985) (informant); United States v. D'Antignac, 628 F.2d 428, 435-36 n.10 (5th Cir. 1980) (informant); United States v. Bernard, 625 F.2d 854, 857 (9th Cir. 1980) (accomplice); People v. Hovey, 749 P.2d 776, 787-88 (Cal. 1988) (distinguishing informant testimony and accomplice testimony); People v. Jackson, 495 N.E.2d 1207, 1221 (Ill. App. Ct. 1986) (accomplice); People v. Reed, 556 N.W.2d 858, 862 (Mich. 1996) (accomplice); People v. McCoy, 220 N.W.2d 456, 460 (Mich. 1974) (accomplice); Edwards v. State, 630 So. 2d 343, 344 (Miss. 1994) (accomplice); State v. Gambrel, 894 P.2d 235, 237-38 (Kan. Ct. App. 1995) (informant); People v. Green, 565 N.Y.S.2d 946, 947-48 (App. Div. 1991) (accomplice); *see also* United States v. Jacobs, 475 F.2d 270, 286 n.33 (2d Cir. 1973) (affidavits of co-defendant in aid of motion for new trial viewed with great caution); United States v.

clude police officers within that category.[127] The court indicated that such an instruction "would be tantamount to saying that police officers are inherently untrustworthy," something that the court was unwilling to do.[128] The court ruled that the traditional safeguards underlying the legal system serve to adequately protect the parties—namely, " 'the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury.' "[129]

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Gotti, 171 F.R.D. 19, 47-48 (E.D.N.Y. 1997) (affidavits prepared by mob boss in support of motion for new trial, based on allegations that mafia informant committed perjury and government improperly vouched for informant, should be viewed with great caution). *But see* People v. Hunter, 782 P.2d 608, 618-19 (Cal. 1989) (en banc) (cautionary instruction as to testimony of immunized witnesses unnecessary where general instruction on credibility given with modified instruction directing jury to consider witness's grant of immunity); State v. Draughn, 602 N.E.2d 790, 796-97 (Ohio Ct. App. 1992) (no entitlement to addict-informant instruction where jury already aware informant a narcotics addict paid by police); State v. Simson, 775 P.2d 837, 839 (Or. 1989) (en banc) (cautionary jury instruction regarding accomplice testimony should only be given where testimony implicates defendant); State v. Parsons, 342 N.W.2d 21, 22-23 (S.D. 1984) (although cautionary instruction must be given when accomplice and informants have testified, no cautionary instruction necessary for testimony of immunized witnesses); *cf.* United States v. Solomon, 856 F.2d 1572, 1577-79 (11th Cir. 1988) (omission of jury instruction to effect that testimony of admitted drug addict and accomplice given immunity under plea bargain agreement should be viewed with suspicion not plain error because general instruction on credibility given along with other general instructions regarding credibility of convicted felon); Commonwealth v. Brousseau, 659 N.E.2d 724, 728 (Mass. 1996) (holding that failure of court to give *sua sponte* cautionary instruction specifically mentioning credibility of witnesses testifying under plea bargain or grant of immunity did not raise substantial likelihood of miscarriage of justice). *See generally* 1 DEVITT ET AL., *supra* note 119, § 15.02 (informant); 1 *id.* § 15.03 (immunized witness); 1 *id.* § 15.04 (accomplice); 1 *id.* § 15.05 (drug/alcohol abuser); 1 *id.* § 15.10 (perjurer).

127. *See Bush*, 375 F.2d at 604.

128. *Id.*; *see also, e.g.*, Lovings v. State, 62 N.W.2d 672, 676 (Neb. 1954) (" 'The mere fact that witnesses in a criminal prosecution are regular police officers of a city will not justify an instruction that the jury, in weighing their testimony, should exercise greater care than in weighing the testimony of other witnesses.' ") (quoting Fisher v. State, 47 N.W.2d 349 (Neb. 1951)); State v. Williams, 430 S.E.2d 888, 895 (N.C. 1993) (finding that the defendant was not entitled to jury instruction stating that police are no more credible than ordinary witnesses; general instruction concerning witness credibility sufficient).

129. *Bush*, 375 F.2d at 604 (quoting *Hoffa*, 385 U.S. at 311). The court indicated that an instruction given to the jury by the trial court to "consider bias, prejudice, and any interest in the outcome of the case which a witness might have, and to give an officer's testimony no weight different from that given any other witness simply because he was an officer" was fair and proper. *Id.* at 605 n.6. *But see* United States v. Reid, 410 F.2d 1223, 1227-28 (7th Cir. 1969). In *Reid*, the United States Court of Appeals for the Seventh Circuit determined that the trial court committed prejudicial error by instructing the jury to consider possible bias, prejudice, and interest of the defendant witness (charged with assaulting a prison guard) without instructing the jury that police witnesses were entitled to no special credibility simply because of their status. *See id.* The court also noted that the United States Court of Appeals for the District of Columbia Circuit, in *Bush*, properly rejected arguments that mandatory cautionary instructions should attach to police witness testimony. *See id.* at 1227.

### 2. *People v. McMurty*[130]

Some courts have adhered to *Bush*'s view of police testimony, while others have not. Not surprisingly, the New York courts have had several opportunities to address the issue, specifically in the context of police testimony in "dropsy" cases. Because it is implausible that a criminal would do something incriminating upon seeing the police, some commentators have suggested that dropsy testimony is particularly dubious:

> [t]he self-interest of an officer who has been guilty of an illegal search and seizure would dictate the commission of perjury to justify his actions, and it is ordinarily very difficult for the defendant to disprove the officer's account of the arrest. When the statistical evidence of police perjury is also considered, it is apparent that the reasons for scrutinizing police testimony are at least as compelling as those for scrutinizing the testimony of an accomplice, a private detective, or a paid informer.[131]

The first noteworthy New York case to analyze the problem was *People v. McMurty*. In *McMurty*, Judge Irving Younger recognized the increasing problem of dropsy testimony in response to the Supreme Court's decision in *Mapp v. Ohio*[132] which applied the exclusionary rule to the states.[133] Noting that courts are "ill equipped to persuade the police to change their practices or alter their philosophy" with regard to dropsy testimony (as that is the job of the prosecutor's office), the court determined that " 'dropsy' testimony should be scrutinized with especial caution."[134] The underpinnings for determining that a witness's testimony should be subject to scrutiny "is the belief that the testimony . . . is so likely to be self-serving or biased that the jury should not accept it at its face value,

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130. 314 N.Y.S.2d 194 (Crim. Ct. 1970).

131. Comment, *supra* note 12, at 520 (footnotes omitted). The authors of the *Georgetown Law Journal* Comment examining police perjury in dropsy cases proposed alternative solutions to the problem of police perjury, including combining scrutiny of the officer's testimony with a corroboration rule or a quantitative evidence rule. *See id.* at 520-21. As recognized by the authors, corroboration "would require support of an assertion of lawful conduct," and the quantitative evidence rule would require "direct testimony of a second witness," thus "necessitat[ing] employment of police teams for all narcotics arrests." *Id.* at 521. But the mere fact that more than one officer is present does not guarantee the elimination of police perjury. *See id.* at 522. This is so because of the code of silence.

132. 367 U.S. 643 (1961).

133. *See McMurty*, 314 N.Y.S.2d at 196-97. *See supra* note 46 and accompanying text (discussing the exclusionary rule pursuant to *Mapp* and its relation to dropsy testimony), and *supra* notes 48-49 and accompanying text (Judge Younger's quotation summarizing the problem of dropsy testimony).

134. *McMurty*, 314 N.Y.S.2d at 197.

even where the witness has not otherwise been impeached."[135] Clearly, this directive cuts against the grain of then-Judge Burger's "dismal reflection" concern.[136] The justification for *McMurty*'s abandonment of the position established in *Bush* was expressed by Judge Younger as follows: "When there are grounds for believing that 'the guardians of its security' sometimes give deliberately false testimony, it is no 'dismal reflection on society' for judges to acknowledge what all can see."[137]

As a natural outgrowth of the notion that police testimony should be scrutinized, Judge Younger concluded that where an officer's testimony appears inherently unbelievable, it must be rejected.[138] In addition, if even the slightest independent contradiction of the officer's testimony should become apparent, or if corroboration of the defendant's testimony arises, the evidence should be suppressed.[139] The court noted that the officer's testimony in the case did not appear inherently untruthful, nor was there contradiction or corroboration of either witness's testimony.[140] Therefore, the deciding factor, according to Judge Younger, was to determine whether the burden of proof had been met.[141] Judge Younger ultimately denied the defendant's motion to suppress, noting that the burden of proof traditionally has been placed upon the defendant.[142] Where the testimony was evenly balanced on both sides, as it was in *McMurty*, the prosecution must prevail.[143]

### 3. *People v. Berrios*[144]

Judge Younger's candid approach was quickly rejected by higher courts. About nine months after *McMurty* was decided, the New York

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135. Comment, *supra* note 12, at 519-20.

136. *See supra* text accompanying note 123.

137. *McMurty*, 314 N.Y.S.2d at 197; *accord* United States *ex rel.* Petillo v. New Jersey, 400 F. Supp. 1152, 1180 (D.N.J. 1975), *vacated and remanded sub nom.* Albanese v. Yeager, 541 F.2d 275 (3d Cir. 1976). The court in *ex rel. Petillo* recognized that:

> Every experienced litigator and jurist knows that witnesses are not always truthful, and that sometimes a judgment will be improvidently granted based on a misplaced belief in the integrity of the evidence adduced. No system of justice worthy of the name, however, could willingly countenance the continued validity of such process once the falsity of its underpinning has been conclusively and timely demonstrated.

*Id.*

138. *See McMurty*, 314 N.Y.S.2d at 197.

139. *See id.* at 198.

140. *See id.*

141. *See id.*

142. *See id.* (citing People v. Baldwin, 250 N.E.2d 62, 63 (N.Y. 1969)).

143. *See McMurty*, 314 N.Y.S.2d at 198.

144. 270 N.E.2d 709 (N.Y. 1971).

Court of Appeals decided *People v. Berrios*. In *Berrios*, the court had to determine whether to depart from the traditional approach, as recognized in *McMurty*, by shifting the burden of proof in a suppression hearing to the prosecution in dropsy-type situations because of the possibility of perjury.[145] Even though legendary Manhattan District Attorney Frank Hogan agreed with the defendants on this point, the court declined to do so.[146] The court noted that, although under the existing scheme the defendant had the burden of demonstrating the illegality of the search and seizure, the prosecution had " 'the burden of *going forward* to show the legality of the police conduct in the first instance.' "[147] That is, according to the court, the prosecution was required to demonstrate that the search and seizure was reasonable—that it was made pursuant to a valid warrant, on consent, incident to a lawful arrest, or that there was no search because the defendant dropped the evidence.[148]

Quoting then-Judge Burger's opinion in *Bush*, the court refused to "infer that the police are systematically evading the mandate of *Mapp* by fabricating their testimony,"[149] and rejected a "frontal attack on the integrity of our entire law enforcement system."[150] The court indicated that since there is no proof that all police commit perjury, the police should not be singled out as suspect.[151]

Professor Joseph Grano correctly underscored the significance of *Berrios*: First, "it places New York among the minority of jurisdictions that require the defendant to bear the ultimate burden of proof in nonwarrant cases"; second, and more importantly, "it indicates a reluctance to create an exception for certain types of cases that present an especially strong possibility of police perjury."[152] Thus, even though the court was interpreting a rule which was already pro-prosecution, even though there was good reason to doubt much of the particular category of testimony at issue, and even though a respected district attorney took the extremely unusual step of adopting the defense position, the court refused to impose even a limited additional degree of scrutiny on police testimony.

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145. *See id.* at 712. Those advocating a change in the burden of proof were five defendants in five separate and unrelated cases, decided together on the issue. *See id.* at 711-12.

146. *See id.* at 712-13.

147. *Id.* (quoting People v. Whitehurst, 254 N.E.2d 905, 906 (N.Y. 1969)).

148. *See Berrios*, 270 N.E.2d at 713.

149. *Id.*

150. *Id.*

151. *See id.*

152. Grano, *supra* note 13, at 452.

*4. Maynard v. Sayles*[153]

Courts in jurisdictions other than New York have addressed the problem of police perjury as well. Notably, in *Maynard v. Sayles*, a civil rights action against Kansas City police officers alleging excessive use of force, the United States Court of Appeals for the Eighth Circuit addressed the admissibility of code of silence evidence.[154] The plaintiff wanted to impeach police witnesses through testimony of a former Kansas City police officer that a code of silence existed within the Kansas City police department.[155] The district court excluded the evidence and dismissed the action.[156] A panel of the Eighth Circuit reversed and remanded the case for a new trial, holding that it was reversible error to exclude the testimony.[157] Interestingly, the Eighth Circuit granted rehearing en banc, vacating the panel decision; because the en banc court was equally divided, the district court's decision was affirmed without opinion.[158] The approach by the panel in its vacated decision, however, is illustrative.

Like the cases addressing the issue in the context of dropsy testimony, the defendant in *Maynard* asserted that because of the code of silence, the officers' testimony justifying the beating of the plaintiff was inherently suspect.[159] At trial, the plaintiff attempted to introduce the testimony of a former Kansas City police officer as evidence of the code of silence in order to undermine the police witnesses' credibility.[160] During an offer of proof, the former officer testified that "where a fellow officer has used excessive force in arresting a criminal suspect, the witnessing officers will not discuss the incident except to corroborate the fellow officer's version of the arrest."[161]

The panel addressed the evidentiary issue concerning whether to admit the testimony under Rules 406 (evidence as habit or routine practice) and 403 (whether prejudice outweighs probative value) of the Federal

153. 817 F.2d 50 (8th Cir.), *vacated en banc*, 831 F.2d 173 (8th Cir. 1987). Thanks to Sam Stonefield for mentioning this case to us.

154. *See Maynard*, 817 F.2d at 51-52.

155. *See id.* at 52.

156. *See id.*

157. *See id.* at 53.

158. *See* Maynard v. Sayles, 831 F.2d 173 (8th Cir. 1987). Judge Bright of the United States Court of Appeals for the Eighth Circuit dissented for the reasons expressed in the panel opinion. *See id.* at 174. Chief Judge Lay and Judges Heaney, McMillian, and Arnold joined the dissent. *See id.*

159. *See Maynard*, 817 F.2d at 52.

160. *See id.*

161. *Id.*

Rules of Evidence.[162] The panel found that the testimony had sufficient foundation to be admitted as evidence of routine practice under Rule 406 even though the plaintiff could produce only one witness to testify about the existence of the code of silence.[163] The panel noted that the nature of the code of silence makes it unlikely that other officers would testify regarding its existence, thus rendering access to additional evidence nearly impossible.[164] The panel also clarified that the testimony was admissible only for the purpose of casting doubt upon the credibility of the officers' story that the plaintiff resisted arrest, and not for proving that the Kansas City police officers followed a routine practice of using excessive force.[165] Thus, because the plaintiff's case rested in part on discrediting the testimony of the police witnesses, the panel determined that it was reversible error to exclude testimony regarding the code of silence.[166]

The opinion of the three-judge panel of the Eighth Circuit in *Maynard*, as well as Judge Younger's opinion in *McMurty*, reflect attempts by courts to modify the narrow and deferential approach to police testimony established by *Bush* and its progeny. Both opinions, however, failed to achieve their intended goals, as *Maynard* was vacated (without opinion)[167] and *McMurty*'s "view with suspicion" approach was quickly overturned by a higher court.[168] The result is that courts have proved reluctant to treat with suspicion the police testimony which is necessary for the functioning of the system—even when there may be reason to doubt it.

The courts did not deny that police perjury was a problem, they just

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162. *See id.* at 52-53.

163. *See id.* at 52. Specifically, the panel determined that Rule 406 does not require evidence of routine practice to be corroborated in order to be admissible, *see* FED. R. EVID. 406, and courts routinely determine that the testimony of one or two witnesses is sufficient to establish foundation. *See Maynard*, 817 F.2d at 52-53.

164. *See Maynard*, 817 F.2d at 52. The panel also noted that although the defendant attacked the officer's testimony as that given by a former officer "with an ax to grind" (referring to a suit filed by the officer against the police department), often the only officers who will testify against a department are those with complaints. *See id.* at 52 n.1.

165. *See id.* at 53.

166. *See id.*; *accord* United States *ex rel.* Petillo v. New Jersey, 400 F. Supp. 1152, 1182-83 (D.N.J. 1975) (asserting that "[i]f police perjury is to be exposed, fundamental fairness requires that the courts permit aggrieved citizens to show that such perjury has occurred"), *vacated and remanded sub nom.* Albanese v. Yeager, 541 F.2d 275 (3d Cir. 1976). Upon consideration of Rule 403 of the Federal Rules of Evidence in weighing the probative value of the testimony against its prejudicial effect, the panel determined that the trial court did not err in refusing to admit a portion of the former officer's testimony regarding an incident relating directly to one of the arresting officer witnesses, because that testimony was highly prejudicial to the witness. *See Maynard*, 817 F.2d at 53.

167. *See* Maynard v. Sayles, 831 F.2d 173 (8th Cir. 1987).

168. *See* People v. McMurty, 314 N.Y.S.2d 194 (Crim. Ct. 1970).

ruled that it was not their problem.[169] In *Berrios*, for example, the New York Court of Appeals suggested that police executives and prosecutors deal with the problem through departmental discipline and prosecutorial discretion in selection and prosecution of witnesses.[170] The *Bush* court, speaking through then-Judge Warren Burger, suggested that "a properly instructed jury" would be able to evaluate the credibility of police witnesses.[171]

If courts have proven unwilling to establish broad prophylactic rules against police perjury, they also seem blasé about individual cases of proven dishonesty. The Knapp Commission reported that "the risks of severe punishment for corrupt behavior are slight. A dishonest policeman knows that, even if he is caught and convicted, he will probably receive a court reprimand or, at most, a fairly short jail sentence."[172] Twenty years later, there still seemed to be some truth to the commission's findings. For example, Steven Pataki, an officer "convicted of perjury that sent a man to prison for three years . . . was given a three-month sentence."[173]

## IV. Impeachment Through Evidence of Bias and Motive to Lie

Of the participants in the criminal justice system, the one in the best position to deal with the problem of police perjury may be the one that some courts and prosecutors have suggested should deal with it, namely, the trial jury. The very purpose of trial juries is to decide the truth in individual cases. Given the right tools, trial juries can be expected to do a

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169. A notable exception is the New York rule that appellate courts may reject police testimony which is incredible or patently untrue even if the finder of fact at trial accepted it. In *People v. Heath*, 625 N.Y.S.2d 540, 541 (App. Div. 1995), for example, the Appellate Division of the New York Supreme Court found that an officer's "testimony that he observed defendant exchanging a 2-inch glass vial with a dark top, from a distance of approximately 74 feet, from a moving patrol car, after dark, is, in our view, contrary to common experience and, as such, was incredible as a matter of law and did not support the verdict." *Id.* at 541. Accordingly, it applied the rarely invoked rule to reverse a conviction for drug selling. *See id.*; *see also, e.g.*, *In re* Pierre N., 637 N.Y.S.2d 704, 705 (App. Div.) (rejecting police testimony), *appeal denied*, 668 N.E.2d 417 (N.Y. 1996); People v. Lebron, 585 N.Y.S.2d 498, 500 (App. Div. 1992) ("A reviewing court is not required to 'discard common sense and common knowledge' in assessing an officer's hearing testimony, and when such testimony appears 'manifestly untrue, physically impossible, contrary to experience or self-contradictory,' it must be rejected on appeal despite the hearing court's findings otherwise.") (citations omitted).

170. *See* People v. Berrios, 270 N.E.2d 709, 714 (N.Y. 1971).

171. *See* Bush v. United States, 375 F.2d 602, 604 (D.C. Cir. 1967).

172. Knapp Commission, *supra* note 19, at 252-53.

173. Kocieniewski, *supra* note 4, § 1, at A1.

good job of determining whether witnesses, including police officers, are testifying honestly in the disputes they decide.

One essential tool is, of course, information about the credibility of witnesses. Principles of evidence permit impeachment of the credibility of a witness through proof of bias or motive to lie, and permit extrinsic evidence to demonstrate such bias or motive.[174] Once proof of bias or motive to lie has been established, the credibility of the witness is called into question, and an instruction may be fashioned to indicate to the jury that it should consider any bias or motive to lie that might color the testimony of a particular witness. The remainder of this article suggests that this approach will lead to more accurate results in individual cases by providing juries with relevant information that will help them make credibility determinations. It may also have positive effects on the system as a whole by encouraging policymakers to control police perjury.

### *A. Impeachment Through Proof of Bias and Motive to Lie Is Permitted*

Cross-examination, the Supreme Court has said, is "the 'greatest legal engine ever invented for the discovery of truth.' "[175] Among the most probative evidence of credibility which can be put before a jury is evidence showing that the witness is not neutral, but rather has some bias or motive to testify inaccurately.

"Bias is a term used . . . to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party."[176] Rules in many states explicitly allow impeachment based on bias or motive to lie,[177] and, although not mentioned in the Federal Rules of Evidence, because of "its wide acceptance and established use at common law[,]"[178]

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174. *See infra* part IV.A.

175. California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 WIGMORE § 1367).

176. United States v. Abel, 469 U.S. 45, 52 (1984); *see also* CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 40, at 85 (Edward W. Cleary et al. eds., 3d ed. 1984); JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 607[03], at 607-27 (1996); 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6095, at 516 (1990); Steven Lubet, *Understanding Impeachment*, 15 AM. J. TRIAL ADVOC. 483, 535 (1992); H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 784 (1993).

177. Although the Federal Rules of Evidence contain no specific provision allowing for the impeachment of the credibility of the witness through bias, interest, or motive to lie, several state rules of evidence explicitly provide for such a method of impeachment. *See, e.g.*, ALA. R. EVID. 616; ALASKA R. EVID. 613; HAW. R. EVID. 609.1; MISS. R. EVID. 616; OHIO EVID. R. 616; OR. EVID. CODE 609-1 [OR. REV. STAT. § 40.360]; S.C. R. EVID. 608; TENN. R. EVID. 616.

178. Fred Warren Bennett, *How to Administer the "Big Hurt" in a Criminal Case: The Life*

federal courts have had little difficulty in holding that such impeachment was impliedly authorized. Thus, proof of bias or motive to lie is recognized as one of the common methods of impeaching a witness to discredit the witness's testimony.[179] "In fact, the law regards proof of bias as a particularly favored basis for attacking credibility."[180] Wigmore writes that "[t]he range of external circumstances from which probable bias may be inferred is infinite."[181] Indeed, in criminal cases, the right to impeach government witnesses for bias is grounded in the Constitution itself.[182]

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*and Times of Federal Rule of Evidence 806*, 44 CATH. U. L. REV. 1135, 1147 (1995); *see also* WEINSTEIN & BERGER, *supra* note 176, ¶ 607[03], at 607-25 (citing United States v. Abel, 469 U.S. 45 (1984)); 27 WRIGHT & GOLD, *supra* note 176, § 6095, at 524 (citing United States v. Abel, 469 U.S. 45 (1984)); Robert J. Hallisey, *Experts on Eyewitness Testimony in Court—A Short Historical Perspective*, 39 HOW. L.J. 237, 238 (1995) ("Witness bias, interest, and motive to distort were recognized early as having considerable importance in evaluating credibility."); Uviller, *supra* note 176, at 784-85 (asserting that the Supreme Court of the United States, as "nominal author of the Rules," has read impeachment-by-bias into the Federal Rules of Evidence).

179. *See* Bennett, *supra* note 178, at 1147; *see also* Rafael Guzman, *Impeaching the Credibility of a Witness: Issues, Rules, and Suggestions*, 1994 ARK. L. NOTES 29, 29 (recognizing five "textbook" methods of attack on credibility of witnesses through impeachment: bias, prior convictions, prior inconsistent statements, prior bad acts, and reputation for untruthfulness). This view is supported by the current Federal Rules of Evidence. Under Rule 607 of the Federal Rules of Evidence, the credibility of a witness may be attacked by any party. *See* FED. R. EVID. 607. Additionally, Rule 611(b) of the Federal Rules permits cross-examination of matters affecting the credibility of the witness. *See* FED. R. EVID. 611(b). Generally, Rule 401 dictates that evidence which has a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence is relevant, *see* FED. R. EVID. 401, and pursuant to Rule 402, any relevant evidence is admissible, unless otherwise provided. *See* FED. R. EVID. 402. Notwithstanding, Rule 403 of the Federal Rules of Evidence requires a determination of whether the prejudicial effect of the admission of the evidence substantially outweighs its probative value. *See* FED. R. EVID. 403. *See generally* United States v. Abel, 469 U.S. 45 (1984); WEINSTEIN & BERGER, *supra* note 176, ¶ 607[03], at 607-25.

180. 27 WRIGHT & GOLD, *supra* note 176, § 6095, at 525.

181. 3A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 949, at 784 (Chadbourne rev. 1970); *see also* EDWARD J. IMMWINKELRIED, EVIDENTIARY FOUNDATIONS 134 (3d ed. 1995) ("There are no special foundational requirements for bias evidence; the opponent may prove any fact or event logically relevant to show bias.").

182. *See* 27 WRIGHT & GOLD, *supra* note 176, § 6095, at 525; MCCORMICK, *supra* note 176, § 40, at 85 (noting that criminal defendants have "a conditional constitutional right to . . . attack the credibility of government witnesses"); *see also* Delaware v. VanArsdall, 475 U.S. 673, 678-79 (1986); United States v. Abel, 469 U.S. 45, 50 (1984); Davis v. Alaska, 415 U.S. 308, 316-17 (1974); United States v. Cropp, 127 F.3d 354, 358 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 898 (1998); Hoover v. Maryland, 714 F.2d 301, 305 (4th Cir. 1983) (quoting United States v. Tracey, 675 F.2d 433, 438 (1st Cir. 1982)); Niziolek v. Ashe, 694 F.2d 282, 289 (1st Cir. 1982); State v. Bova, 690 A.2d 1370, 1377 (Conn. 1997); Elliot v. United States, 633 A.2d 27, 32 (D.C. Ct. App. 1993); Marr v. State, 470 So. 2d 703, 705 (Fla. App. 1985) (en banc); Commonwealth v. Bui, 645 N.E.2d 689, 694 (Mass. 1995); People v. Cunningham, 546 N.W.2d 715, 717 (Mich. Ct. App. 1996).

*United States v. Abel*[183] is one of the leading cases applying the principles of impeachment for proof of bias and motive to lie. In *Abel*, the United States Supreme Court established that a defense witness's common membership with the defendant in the "Aryan Brotherhood" prison gang was probative of bias, even absent proof that the witness had personally adopted the tenets of the organization.[184] In *Osborne v. City of Long Beach*,[185] an unpublished decision of the United States Court of Appeals for the Ninth Circuit, the court applied *Abel* to a police department, holding that police code of silence evidence is relevant to show bias.[186] Both of these cases are examined in detail below.

### *1. United States v. Abel*[187]

In *United States v. Abel*, the respondent, Abel, and two companions were indicted for robbery.[188] The two companions pled guilty, but Abel proceeded to trial.[189] One of Abel's companions, Ehle, identified Abel as a participant in the crime.[190] Abel used the testimony of one Mills, a prison acquaintance of both Abel and Ehle, to impeach Ehle's testimony.[191] Mills testified that Ehle had approached Mills after the robbery to tell him that he was prepared to falsely implicate Abel in the robbery to obtain favorable treatment from the government.[192] The prosecutor, in turn, impeached Mills with testimony that Ehle, Abel, and Mills were all members of a secret prison gang called the "Aryan Brotherhood," which required all of its members to deny the existence of the gang, to commit perjury, and even to commit murder to protect other members.[193]

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183. 469 U.S. 45 (1984).
184. *See id.* at 52.
185. No. 87-6262, 1988 WL 141391 (9th Cir. Dec. 20, 1988).
186. *See id.* at *4-5.
187. 469 U.S. 45 (1984).
188. *See id.* at 47.
189. *See id.*
190. *See id.*
191. *See id.*
192. *See id.*
193. *See id.* Other courts have recognized the existence of a code of silence among prison gang members. *See, e.g.*, Schlup v. Delo, 912 F. Supp. 448, 453 (E.D. Mo. 1995) (inmates may be placed in danger if they fail to adhere to code of silence); People v. Griffith, 634 N.E.2d 1069, 1072-73 (Ill. 1994) (prison gang members do not talk about what goes on in the prison); *see also* Hayes v. State, 453 S.E.2d 11, 14 (Ga. 1995) (upholding trial court's admission of police officer's testimony that name of gang meant "I will die for you, You will die for me"); Stephen A. Saltzberg, *Bias Evidence and Gang Membership*, 11 CRIM. JUST. 46, 50 (1996) ("In some cases, the defense may seek to establish that government witnesses are members of the same club, even if it is not a gang, to show why those witnesses have a motive to corroborate one another.").

The jury convicted Abel, but a divided panel of the Ninth Circuit reversed.[194] The court of appeals found reversible error because the trial court "allowed defense witness Mills to be impeached by association" with a perjurious organization.[195] The appeals court reasoned that this violated "settled law that the government may not convict an individual merely for belonging to an organization that advocates illegal activity."[196]

The Supreme Court unanimously reversed, holding that evidence of the existence of the secret prison gang was relevant to show bias on the part of a witness in favor of the defendant.[197] Although the Court acknowledged that the Federal Rules of Evidence did not explicitly authorize impeachment for bias, the Court concluded that the Federal Rules did not intend to eliminate the "evidentiary availability of cross-examination for bias" which existed under the common law prior to the promulgation of the Federal Rules.[198]

According to the court, Ehle's testimony concerning the existence of the prison gang made the existence of Mills's bias more probable; therefore, the testimony was relevant to support that inference.[199] In fact, the Court observed that "[p]roof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony."[200] The Court determined that because Mills and Abel both belonged to the Aryan Brotherhood, an organization which required its members to lie and even kill to protect each other, the inference that Mills had slanted or even fabricated his testimony was

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194. *See Abel*, 469 U.S. at 48; *see also* United States v. Abel, 707 F.2d 1013, 1016-17 (9th Cir. 1983), *rev'd*, 469 U.S. 45 (1984).

195. *Abel*, 707 F.2d 1016-17.

196. *See id.* at 1016 (citing Bradenburg v. Ohio, 395 U.S. 444, 448 (1969); Scales v. United States, 367 U.S. 203, 219-24 (1959)).

197. *See Abel*, 469 U.S. at 49.

198. *Id.* at 50; *see, e.g.*, District of Columbia v. Clawans, 300 U.S. 617, 630-32 (1937) (recognizing the availability of cross-examination for bias); Funk v. United States, 290 U.S. 371, 380 (1933) (effect of bias on interested witness reduced by availability of cross examination); Alford v. United States, 282 U.S. 687, 692 (1931) (one permissible purpose of cross-examination is to show that testimony is biased). Indeed, *Davis v. Alaska*, 415 U.S. 308 (1974), determined that the Confrontation Clause of the Sixth Amendment to the Constitution dictates that a defendant shall have the opportunity to demonstrate bias of a prosecution witness. *See id.* at 316-18. The *Abel* Court further noted that the Advisory Committee Notes to Rules 608 and 610 of the Federal Rules of Evidence make reference to bias. *See Abel*, 469 U.S. at 51; *see also* FED. R. EVID. 608 & 610 advisory committee's notes.

199. *See Abel*, 469 U.S. at 52.

200. *Id.*

strongly supported.[201]

Finally, the Court rejected the claim that the prejudicial effect of the admission of the evidence outweighed its probative value under Rule 403 of the Federal Rules of Evidence.[202] The Court noted that the district court is given wide discretion in determining admissibility under Rule 403, and found that the district court did take measures to help alleviate any undue prejudice.[203] In determining that the probative value of the testimony in the form it was presented outweighed any prejudice, the Supreme Court stated that "[t]he attributes of the Aryan Brotherhood—a secret prison sect sworn to perjury and self-protection—bore directly not only on the *fact* of bias but also on the *source* and *strength* of Mills' bias."[204]

### 2. *Osborne v. City of Long Beach*[205]

In *Osborne v. City of Long Beach*, the Ninth Circuit applied *Abel* to hold that evidence regarding a code of silence in the Long Beach, California police department was relevant and admissible to show bias.[206] The case involved a § 1983 claim by the plaintiff against several Long Beach police officers for false arrest and assault and battery.[207] One of the officers allegedly slapped the plaintiff twice in the course of arresting him and two other suspects.[208] At trial, one of the officers gave testimony that was, according to the court of appeals, inconsistent with the arrest reports.[209] The jury found that the officers were not liable to the plaintiff.[210]

On appeal, the plaintiff claimed that the district court erred by excluding evidence regarding the existence of a code of silence among the

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201. *See id.*

202. *See id.* at 53-55. It was not Abel's contention that the entire testimony regarding membership in the prison gang should have been excluded because the prejudicial effect outweighed the probative value; rather, Abel argued that the portion of the testimony specifically describing the Aryan Brotherhood as a "lying and murderous organization" should not have been permitted. *See id.* at 54.

203. *See id.* at 54-55. The district court ruled that the prosecutor was not permitted to use the term "Aryan Brotherhood" in reference to the gang because it was unduly prejudicial. *See id.* at 48. Thus, upon cross-examination, the prosecutor described the gang as a "secret type of prison organization." *Id.*

204. *Id.* at 54.

205. No. 87-6262, 1988 WL 141391 (9th Cir. Dec. 20, 1988).

206. *See id.* at *4-5.

207. *See id.* at *1.

208. *See id.*

209. *See id.* at *2-3.

210. *See id.* at *2.

Long Beach police.[211] The evidence at trial was to be in the form of testimony by a former chief of the department that in twenty-seven years with the Long Beach police, he recalled hearing of only one instance of "whistle-blowing" by one officer against another for excessive use of force.[212] In addition, the witness was to testify that "peer pressure, in the form of potential ostracism and refusal to assist, worked against an officer breaking this code of silence."[213] The court of appeals relied upon the United States Supreme Court's decision in *Abel* in determining that " '[a] witness' and a party's common membership in an organization, even without proof that the witness or party has personally adopted its tenets, is certainly probative of bias.' "[214] The court remanded the case for a determination of whether the code of silence evidence was admissible under the probative value/prejudicial effect balancing test of Rule 403 of the Federal Rules of Evidence, and if so, whether the failure to admit the evidence constituted prejudicial error.[215]

The *Osborne* court's application of *Abel* is sound. It dovetails with the many cases holding that defendants may introduce evidence that police officers have some motive to lie in a particular case.[216] Similarly, many cases recognize that parties may impeach police officers[217] or po-

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211. *See id.* at *4. The district court determined that the evidence was irrelevant and, in any event, more prejudicial than probative under Rule 403 of the Federal Rules of Evidence. *See id.*

212. *See id.*

213. *Id.*

214. *Id.* (quoting United States v. Abel, 469 U.S. 45, 52 (1984)).

215. *See id.* at *9. The court cited *United States v. Wallace*, 848 F.2d 1464, 1475-76 (9th Cir. 1988), for the proposition that "where [a] criminal trial turns on credibility of witnesses, errors which go to credibility are particularly troubling." *Osborne*, 1988 WL 141391, at *9.

216. *See* People v. Fatone, 211 Cal. Rptr. 288, 293 (App. Ct. 1985) ("Defense counsel has an absolute right to explore avenues of potential bias with a prosecution witness, particularly a police officer."); Webb v. State, 336 So. 2d 416, 418 (Fla. Dist. Ct. App. 1976) (reversing criminal conviction where defendant was prohibited from introducing evidence of contemplated civil suit by defendant against police); State v. Smits, 792 P.2d 565, 567-68 (Wash. Ct. App. 1990) (reversing conviction where defendant was precluded from inquiring about potential civil suit by officer against defendant); State v. Jones, 610 P.2d 934, 937 (Wash. Ct. App. 1980) (holding that evidence of alleged personal bias by police against defendant should have been admitted).

217. *See* Blair v. United States, 401 F.2d 387, 390 (D.C. Cir. 1968) (noting that evidence of police brutality should, if offered, be admitted at retrial to show bias of police officers as witnesses); Hutching v. State, 518 P.2d 767, 769 (Alaska 1974) (holding that defendant should have been permitted to explore possible bias on part of key prosecution witness who was a former police officer seeking reinstatement to the department); Mendez v. State, 412 So. 2d 965, 966 (Fla. Dist. Ct. App. 1982) (reversing conviction where defendant was precluded from introducing evidence of an officer's motive for "misrepresentation of the true facts surrounding the . . . incident," namely, avoiding official discipline); Stripling v. State, 349 So. 2d 187, 191 (Fla. Dist. Ct. App. 1977) (reversing bribe solicitation conviction where defendant was precluded from bringing out fact that key police witness was under investigation for "shake downs" and thus had a motive to "ingratiate himself and possi-

tential defendants[218] by showing that they are susceptible to being helped or hurt by law enforcement authorities and therefore have a reason to tailor their testimony. Cases also recognize that a witness may be impeached with evidence that they may be subject to retaliation for their testimony.[219] A leading treatise explains that "[b]ias has . . . been found where it is shown that a witness has a personal interest in the outcome of litigation or the matters about which she testifies. Cases in this category include instances where the witness . . . may be subject to criticism or disgrace for the content of her testimony."[220] *Osborne*, then, seems to be nothing more than application of well-settled rules in a somewhat novel factual context.

### *B. Extrinsic Evidence to Show Bias and Proof of Motive to Lie is Permitted*

The traditional rule is that extrinsic evidence is not admissible to impeach a witness on a collateral matter.[221] But because evidence of bias

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bly vindicate himself with the state's attorney's office"); Lutherman v. State, 348 So. 2d 624, 625 (Fla. Dist. Ct. App. 1977) (reversing conviction where defendant was precluded from cross-examining police officers on fact that they were under investigation for brutality based on arrest of defendant); People v. Robinson, 371 N.E.2d 1170, 1176 (Ill. Ct. App. 1977) (holding that defendant charged with assaulting police officer and claiming that he was the victim of a police assault should have been permitted to show that the officer had been suspended for "committing an act of violence" and that the officer's testimony "may have been influenced by a desire to return to active duty without further trouble and to avoid continued suspension or other disciplinary measures"); Jones v. State, 837 P.2d 1349, 1354 (Nev. 1992) (reversing conviction where defendant was precluded from attempting "to prove that the officers involved in the arrest may have been motivated to lie by the possibility that they might be exposed to civil liability for the beatings"); State v. Miller, 194 S.E.2d 353, 358 (N.C. 1973) (affirming lower court's holding that it was error to exclude evidence of police brutality offered to show bias of police); Moody v. State, 830 S.W.2d 698, 705 (Tex. Ct. App. 1992) (reversing conviction where defendant was not permitted to impeach police witness by showing that officer had motive to lie about incident to cover up his violation of department policy).

218. *See* Davis v. Alaska, 415 U.S. 308, 316-17 (1974) ("[E]xposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."); United States v. Boyd, 833 F. Supp. 1277, 1360 (N.D. Ill. 1993) ("Evidence that a government witness has a bias in favor of the government is always permissible cross-examination and, if not admitted by the witness, may be proven by extrinsic evidence."), *aff'd*, 55 F.3d 239 (7th Cir. 1995); *cf.* Giglio v. United States, 405 U.S. 150, 155 (1972) (reversing conviction where government failed to disclose that its key trial witness had been offered the possibility of leniency and stating that such evidence "would be relevant to his credibility and the jury was entitled to know of it").

219. *See, e.g.*, United States v. Keys, 899 F.2d 983, 987-88 (10th Cir. 1990) (holding that gang membership could be proven to show that witnesses may be subject to retaliation).

220. 27 WRIGHT & GOLD, *supra* note 176, § 6095, at 520-22.

221. *See* 3A WIGMORE, *supra* note 181, § 948, at 783-84.

directly impacts upon the witness's credibility, the use of such extrinsic evidence is always permitted to impeach the witness.[222] As the Supreme Court explained in *Davis v. Alaska*,[223] defense counsel should be "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness."[224] Courts impose no "limits on the admissibility of extrinsic evidence of bias."[225] That is, even if the witness fails to admit to the facts that establish bias, other forms of proof, such as testimony of other witnesses, is liberally permitted.[226]

There is a split of authority on the issue of whether a foundation must be laid, by cross-examination of the witness under attack, before extrinsic evidence of the facts demonstrating bias can be admitted. Where bias is evidenced by a prior statement of the witness, a majority of courts appear to require that the witness first be asked about the facts demonstrating bias and be given the opportunity to admit or deny those facts.[227]

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222. *See* United States v. Abel, 469 U.S. 45, 51 (1984); WEINSTEIN & BERGER, *supra* note 177, ¶ 607[03], at 607-27; Bennett, *supra* note 178, at 1147; Anthony M. Brannon, *Successful Shadowboxing: The Art of Impeaching Hearsay Declarants*, 13 CAMPBELL L. REV. 157, 164 (1991); Uviller, *supra* note 176, at 785. The Court in *Abel* recognized that federal courts of appeals have permitted the use of extrinsic evidence to show bias both before and after the adoption of the Federal Rules. *See Abel*, 469 U.S. at 51; *see, e.g.*, United States v. James, 609 F.2d 36, 46 (2d Cir. 1979); United States v. Frankenthal, 582 F.2d 1102, 1106 (7th Cir. 1978); United States v. Brown, 547 F.2d 438, 445-46 (8th Cir. 1977); United States v. Harvey, 547 F.2d 720, 722 (2d Cir. 1976); United States v. Robinson, 530 F.2d 1076, 1079-80 (D.C. Cir. 1976); United States v. Blackwood, 456 F.2d 526, 530 (2d Cir. 1972).

223. 415 U.S. 308 (1974).

224. *Id.* at 318.

225. 27 WRIGHT & GOLD, *supra* note 176, § 6095, at 525-26 (footnote omitted).

226. *See* WEINSTEIN & BERGER, *supra* note 176, ¶ 607[03], at 607-28; 27 WRIGHT & GOLD, *supra* note 176, § 6095, at 526.

There are certain limitations on the admissibility of extrinsic evidence of bias. For example, extrinsic evidence is not admissible if it violates a constitutional right, such as the privilege against self-incrimination, *see* WRIGHT & GOLD, *supra* note 176, § 6095, at 527 & n.46 (citing Coil v. United States, 343 F.2d 573, 577-79 (8th Cir. 1965)), or another rule of evidence, *see id.* at 527-28. In addition, Rule 403 probative value/prejudicial effect considerations may cause extrinsic evidence to be excluded in appropriate cases. *See* WEINSTEIN & BERGER, *supra* note 176, ¶ 607[03], at 607-43; WRIGHT & GOLD, *supra* note 176, § 6095, at 528. Courts also have limited discretion to determine the extent to which the proof will be admitted under Rules 102, 104(b), 611, 901(a), and 1008 of the Federal Rules of Evidence. *See* WEINSTEIN & BERGER, *supra* note 176, ¶ 607[03], at 607-30 to 607-31.

227. *See* MCCORMICK, *supra* note 176, § 40, at 87; *see, e.g.*, United States v. Harvey, 547 F.2d 720, 722 (2d Cir. 1976) (noting that proper foundation is required prior to proffer of extrinsic evidence of bias); Washington v. United States, 499 A.2d 95, 102 (D.C. 1985) (noting that before extrinsic evidence can be introduced, a majority of courts, including the District of Columbia Court of Appeals, require a proper foundation by first cross-examining the witness); Hebert v. State, Nos. 01-86-00595-CR, 01-86-00596-CR, 1987 WL 5119, at *2 (Tex. Ct. App. Apr. 30, 1987) (noting that

Allowing the witness an opportunity to comment on the statement promotes fairness to the witness and may save time by obviating the need for unnecessary extrinsic evidence in the event of an admission of bias.[228]

Where bias is indicated by conduct or circumstances rather than statements, authorities are split on the issue of a foundation as a prerequisite to the admission of extrinsic evidence.[229] Prior to the enactment of the Federal Rules of Evidence, federal courts apparently required no foundation if bias was to be suggested by conduct or circumstances.[230] Several authorities endorse this approach,[231] while others suggest that the

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Texas Rules of Criminal Evidence require that witness have the opportunity to admit, deny, or explain evidence of bias as predicate to admission of extrinsic evidence; if bias unequivocally confessed, no extrinsic evidence admissible); *see also* WEINSTEIN & BERGER, *supra* note 176, ¶ 607[03], at 603-53 to 607-54 (asserting that, prior to the enactment of the Federal Rules of Evidence, federal courts required foundation where bias was in form of statement made by witness); 27 WRIGHT & GOLD, *supra* note 176, § 6095, at 531-32, 532 n.65 (noting that federal authorities uniformly require a foundation where bias is evidenced by a prior statement; noting also that not all state courts follow federal authority on this issue). A minority of courts require no foundation by cross-examination of the witness prior to the introduction of extrinsic evidence. *See* MCCORMICK, *supra* note 176, § 40, at 88; *see, e.g.*, Wintjen v. State, 398 A.2d 780, 782 (Del. 1979) (asserting that "[t]he possible bias of a witness is always a relevant inquiry, and a cross-examiner need not lay a foundation to explore it"); Pettie v. State, 560 A.2d 577, 580 (Md. 1989) (stating that, although foundation is necessary where witness general credibility is attacked, no foundation necessary where accuracy of witness testimony is challenged through bias); Clayton v. Freehold Township Bd. of Educ., 337 A.2d 361, 363 (N.J. 1975) ("[B]ias of a witness may be shown by extrinsic evidence without the necessity for prior cross-examination of the witness."); State v. Kehn, 361 N.E.2d 1330, 1335 (Ohio 1977) ("The impeachment of a witness by showing bias or prejudice does not require the foundation necessary for impeaching a prior inconsistent statement . . . ."); State v. Williams, 573 N.E.2d 704, 706 (Ohio Ct. App. 1988) (noting that Ohio follows "minority rule," which does not require foundation to be laid as a prerequisite to introduction of extrinsic evidence of bias).

228. *See* MCCORMICK, *supra* note 176, § 40, at 88; 27 WRIGHT & GOLD, *supra* note 176, § 6095, at 533. Even in the event of an unequivocal admission of bias by the witness, admission of extrinsic evidence may be warranted where the bias "is not adequately revealed by just his admission to uttering the words comprising a statement," where the witness does not "disclose the tone of the statement or the circumstances under which it was made," or where the testimony itself is affected by the same bias. *Id.* § 6095, at 534 (footnote omitted).

229. *See* 27 WRIGHT & GOLD, *supra* note 176, § 6095, at 535 & n.76.

230. *See* WEINSTEIN & BERGER, *supra* note 176, ¶ 607[03], at 607-53 (citing Comer v. Pennsylvania R.R. Co., 323 F.2d 863 (2d Cir. 1963)); 27 WRIGHT & GOLD, *supra* note 176, § 6095, at 535 n.76; *see also* United States v. White, 225 F. Supp. 514, 519-21 (D.D.C. 1963) (noting that a fact suggesting bias does not require a foundation by cross-examination, but a statement by a witness indicating bias does), *remanded*, 349 F.2d 965 (D.C. Cir. 1965). State cases also apparently followed this approach. *See, e.g.*, Barraclough v. Union Pac. R.R. Co., 52 S.W.2d 998, 1001-02 (Mo. 1932) (stating that the rule requiring foundation by cross-examination applies only to statements and not to conduct or circumstances).

231. *See* WEINSTEIN & BERGER, *supra* note 176, ¶ 607[03], at 607-54 ("Evidence of biased conduct should remain exempt from a foundation requirement since the notes to Rule 613(b) state: 'Under principles of *expressio unius* the rule does not apply to impeachment by evidence of prior inconsistent conduct.' " ) (first emphasis omitted); 3A WIGMORE, *supra* note 181, § 955 ("the rule [re-

witness should first be given the opportunity to explain the conduct or circumstances indicating bias.[232]

Extrinsic evidence may be essential to demonstrating a witness's bias or motive to lie, because the witness will often attempt to avoid conceding the facts which justify impeachment.[233] For example, witnesses with racial, ethnic or other invidious prejudices will generally be unwilling to admit them.[234] Therefore, the only way to show bias may be through extrinsic evidence.[235] Similarly, a police officer subject to the code of silence who takes the stand to testify concerning the wrongdoing of a fellow police officer will naturally be reluctant to affirm the existence of the code because of the possibility of retaliation.[236]

Bias or motive to lie may be proven through expert testimony or testimony of other witnesses who can attest to the existence of the underlying impeaching facts.[237] This type of evidence may be difficult to obtain, however, especially in the context of impeachment through proof of the code of silence, if the only potential witnesses are the police officers who are exposed to the code on a day-to-day basis.

As a solution to this difficulty, excessive force claimants in cases arising out of the federal district courts of New York have attempted to offer portions of the Mollen Commission report or similar reports as extrinsic evidence of bias and motive to lie to impeach the credibility of police witnesses.[238] In spite of Federal Rule of Evidence 803(8)(C), ren-

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quiring foundation] applies only to utterances, not to conduct or circumstances").

232. *See* MCCORMICK, *supra* note 176, § 40, at 88 ("[W]ords and conduct are usually intermingled in proof of bias, and 'nice and subtle distinctions' should be avoided in shaping this rule of trial practice. Better require a 'foundation' as to both or neither.") (footnote omitted); 27 WRIGHT & GOLD, *supra* note 176, § 6095, at 536 ("If mere words can be ambiguous indicators of bias, conduct can present even greater problems of interpreting meaning." Thus, the "witness' explanation of his conduct may be essential to drawing the proper inferences about bias." Further, time may be saved by giving the witness a chance to admit to the conduct in question, obviating need for unnecessary extrinsic evidence.).

233. *See* Lubet, *supra* note 176, at 539.

234. *See id.*

235. *See* WEINSTEIN & BERGER, *supra* note 176, ¶ 607[03], at 607-36 (noting that "the existence of bias can usually be demonstrated only circumstantially by proof of relationships or conduct or utterances"); 27 WRIGHT & GOLD, *supra* note 176, § 6095, at 517 ("Because bias is a state of mind, usually it can be proven only circumstantially. This is because a witness rarely admits she is biased and other witnesses cannot testify directly on the issue since they lack personal knowledge of her state of mind.").

236. See *supra* part III.A (discussing retaliation against police officers for breaching the code of silence).

237. *See, e.g.*, Guzman, *supra* note 179, at 30; Lubet, *supra* note 176, at 539.

238. *See* Shaw v. City of New York, No. 95-CIV.-9325 AJP, 1997 WL 187352 (S.D.N.Y. Apr. 15, 1997) (citing Williams v. City of New York, No. 94-CIV.-6234 (S.D.N.Y. Sept. 6, 1996) (unpub-

dering non-hearsay "factual findings resulting from an investigation made pursuant to authority granted by law,"[239] these courts have generally excluded admission of such reports for this purpose.[240]

Other litigants in federal district courts have attempted to offer portions of commission reports as proof of the existence of a code of silence in various police departments to establish *Monell*[241] policy or custom liability of a municipality.[242] Several cases involved suits by police officers against their departments or municipalities under § 1983; each police officer-litigant asserted that they had been subjected to retaliation for speaking out against questionable or invidious department policies or cus-

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lished transcript); King v. City of New York, No. 93-CIV.-7738 (S.D.N.Y. Aug. 15-21, 1996) (unpublished transcript); Jackson v. City of New York, No. 93-CV-174 (E.D.N.Y. Apr. 24, 1996) (unpublished order); Bryant v. New York City, No. CV-92-0960 (E.D.N.Y. Oct. 27, 1994) (slip op.)).

239. For an excellent treatment of the admissibility of investigatory reports under the Federal Rules of Evidence, including Rule 803(8)-Public Records and Reports Exception, see generally Schwartz, *supra* note 12; *see also* Gentile v. County of Suffolk, 129 F.R.D. 435, 442-62 (E.D.N.Y. 1990), *aff'd*, 926 F.2d 142 (2d Cir. 1991).

240. *See Shaw*, 1997 WL 187352, at *9-10 (denying admissibility of Mollen Commission report); *Williams*, No. 94-CIV.-6234, tr. at 85 (as quoted in *Shaw*, 1997 WL 187352, at *8) ("[T]he probative value of the Report is far outweighed by the extreme prejudice. The Report is relevant at best on general credibility issues. . . . It has no relationship to the specific issues or persons in this case."); *Jackson*, No. 93-CV-174, slip op. at 2 (as mentioned in *Shaw*, 1997 WL 187352, at *8) (in case involving two claims that were bifurcated by judge, one claim against individual police officers and one claim against city pursuant to *Monell v. Department of Soc. Serv.*, 436 U.S. 658 (1978), plaintiff proposed trying claims together and offered to limit *Monell* proof to Mollen Commission report; court held that report may prejudice individual defendants in later trial); *Bryant*, No. CV-92-0960, slip op. at 9-10 (as quoted in *Shaw*, 1997 WL 187352, at *7) (Mollen Commission report excluded because it is "simply too great a logical leap to assume that civil rights violations also arise from the same sources that give rise to police corruption"). *But cf. King* (as quoted in *Shaw*, 1997 WL 187352, at *8) (noting that portion of Mollen Commission report was admitted for impeachment upon stipulation of parties).

241. *See* Monell v. Department of Soc. Serv., 436 U.S. 658 (1978). *Monell* established that a municipality may be liable under a § 1983 claim if the plaintiff establishes a constitutional violation resulting from municipal policy or custom. *See id.* at 694; *see also* Pembaur v. City of Cincinnati, 475 U.S. 469, 483-84 (1986).

242. *See* Janetka v. Dabe, 892 F.2d 187 (2d Cir. 1989) (Suffolk County excessive force claimant attempted to introduce portions of the state investigation report issued by the Temporary Commission of Investigation of the State of New York (the "SIC Report") on official condonation of police misconduct by the Suffolk County Police Department); White-Ruiz v. City of New York, No. 93-CIV.-7233 (DLC) (MHD), 1996 WL 603983 (S.D.N.Y. Oct. 22, 1996) (Mollen Commission Report); Domenech v. City of New York, 919 F. Supp. 702, 709-710 (S.D.N.Y. 1996) (Mollen Commission Report); Ariza v. City of New York, No. CV-93-5287, 1996 WL 118535 (E.D.N.Y. Mar. 7, 1996) (Mollen Commission Report); Gentile v. County of Suffolk, 129 F.R.D. 435 (E.D.N.Y. 1990) (proffer by claimant of portions of the SIC Report detailing widespread police and prosecutorial misconduct), *aff'd*, 926 F.2d 142 (2d Cir. 1991); *see also* Ricciuti v. New York City Transit Auth., 754 F. Supp. 980 (S.D.N.Y. 1990) (proffer by claimant of three reports concerning operation of transit authority police department and newspaper reports and court decisions charging or finding that officers had conducted illegal arrests), *vacated*, 941 F.2d 119 (2d Cir. 1991).

toms, in violation of their First Amendment free speech rights.[243] Other cases were brought by excessive force claimants against municipalities and other defendants under § 1983.[244] In only one case did a court reject the use of a report to support a plaintiff's allegation of the existence of an unconstitutional custom or policy.[245] Other cases have admitted the proferred reports into evidence, or have otherwise allowed the reports to support the allegations of municipal policy or custom.[246] In addition, at least one Ninth Circuit excessive force claimant sought to offer excerpts of the Christopher Commission report as relevant to prove municipal liability.[247] The United States Court of Appeals for the Ninth Circuit remanded the case because the District Court improperly excluded the report.[248]

Thus, courts have taken divergent approaches to the admission of reports evincing the pervasive nature of the code of silence or conscious ignorance by police supervisors of their subordinates' behavior. The cases indicate that the Mollen Commission report, or reports similar to it, generally may not be used to impeach the credibility of a police witness in

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243. *See White-Ruiz*, 1996 WL 603983, at *1; *Domenech*, 919 F. Supp. at 705-06; *Ariza*, 1996 WL 118535, at *1.

244. *See Janetka*, 892 F.2d at 891; *Ricciuti*, 754 F. Supp. at 982; *Gentile*, 129 F.R.D. at 439.

245. *See Janetka*, 892 F.2d at 191 (finding that the SIC Report was not relevant and not admissible because the claimant failed to produce a copy of the report, failed to make an offer of proof as to which portions of the report were relevant, and failed to connect the behavior of the individual officers to policy or practice of county). In *Ricciuti*, the court denied the claimant's request to amend his complaint to allege a policy or practice of deliberate indifference by the municipal defendants to the claimant's constitutional rights. *See Ricciuti*, 754 F. Supp. at 986-87. In the amended complaint, the claimant sought to incorporate three reports concerning the operation of the Transit Authority Police Department (the "TAPD") as well as the newspaper reports and court decisions regarding illegal arrests by TAPD officers. *See id.* at 984. The court indicated that because "no common thread emerge[d] from the facts alleged in the proposed amended complaint," the pleading was "insufficient in law." *Id.* at 987. The Second Circuit, however, vacated and remanded, stating that "evidentiary flaws in documents described in a pleading are not a basis for dismissal for failure to state a claim." Ricciuti v. New York City Transit Auth., 941 F.2d 119, 124 (2d Cir. 1991); *cf. Domenech*, 919 F. Supp. at 711 (holding that question of admissibility of Mollen Commission report was moot).

246. *See White-Ruiz*, 1996 WL 603983, at *8 (finding Mollen Commission report admissible in support of *Monell* claim); *Ariza*, 1996 WL 118535, at *3-5 & n.2 (motion for summary judgment by municipality denied, based, in part, on proffered Mollen Commission report, stating that "[t]he code [of silence], by definition, chills speech, and the Mollen report contained evidence . . . supporting plaintiff's claim that he suffered recriminations for breaking the code"); *Gentile*, 129 F.R.D. at 442-62 (finding SIC Report relevant and trustworthy and permitting claimant and defendant to read select portions of report to jury).

247. *See* Montiel v. City of Los Angeles, 2 F.3d 335, 341 (9th Cir. 1993).

248. *See id.* at 341-42 (holding that Christopher Commission report is presumed trustworthy under Rule 803(8)(C) of the Federal Rules of Evidence; district court erred in not requiring defendant to prove lack of trustworthiness of report).

an excessive force case, but that reports may be used substantively to demonstrate the existence of municipal policy or custom for purposes of *Monell*. The Rule 403 probative value/prejudicial effect balancing test plays a large role in determining whether a court will admit the report.

*Shaw v. City of New York*[249] nicely sets forth the reasons some courts find the Mollen Commission report inadmissible for impeachment. In *Shaw*, an excessive force claimant sought to offer excerpts from the Mollen Commission report to demonstrate the existence of the code of silence by which police officers protect fellow officers and lie, if necessary, to do so.[250] The plaintiff claimed that inferences could be fairly drawn from the pre-trial record that the officers "behaved in a manner consistent with the 'code of silence' and 'falsification of reports and testimony' among NYPD police officers which was documented by the (Mollen Commission) Report."[251] The court determined that:

> [i]f the Mollen Commission Report were held admissible here, it logically would be admissible in every suit, civil and criminal, in which a police officer was alleged to be lying to support the testimony of a fellow police officer. Indeed, it would be admissible in every civil and criminal case in which even a single police officer testified. The Court declines to establish such a precedent.[252]

The court noted that "recent high profile cases such as the Rodney King and O.J. Simpson trials" made it unlikely that jurors would need to rely upon the Mollen Commission report to be aware that police officers are sometimes untruthful.[253] In the end, the court held that "[c]urrent public perception, along with an appropriate jury instruction on witness credibility including that the credibility of the specific police officers who are defendants and/or witnesses is for the jury to determine, renders the Mollen Report superfluous," and, in any event, the probative value of the Mollen Commission report was substantially outweighed by prejudice under Rule 403 of the Federal Rules of Evidence.[254]

This reasoning is questionable on several grounds. First, the purpose of the proffer of the report in *Shaw* and in similar cases is to impeach the witness through extrinsic evidence of bias and motive to lie, often where credibility is a critical issue.[255] The bias and motive to lie arise not

249. No. 95-CIV.-9325 AJP, 1997 WL 187352 (S.D.N.Y. Apr. 15, 1997).
250. *See id.* at *7.
251. *Id.*
252. *Id.* at *9.
253. *Id.*
254. *Id.* at *10.
255. *See supra* part IV.A.

merely from a bare assertion that the officers of the department are engulfed by a code of silence,[256] but that the officers will suffer serious repercussions in the form of retaliation as a result of breaking the code. Even if the average juror knows that there is a police code of silence, it is highly doubtful that most realize that the code may be enforced through severe retaliation. Moreover, even questions of fact which are so clear that they can be the subject of judicial notice nevertheless can be proven through evidence.[257]

Second, the decision rests on inconsistent premises. On the one hand, the court concluded that jurors are likely to know details about police culture, including the blue wall of silence.[258] On the other hand, the court found that the introduction of this evidence would be so inflammatory that it should be excluded as substantially more unfairly prejudicial than probative;[259] the same piece of evidence cannot simultaneously be well known to a jury and yet so prejudicial that it must be kept from them lest it interfere with their evaluation of the case.

Further, this kind of evidence seems a poor candidate for exclusion pursuant to Rule 403. As the Supreme Court explained in *Abel*, the characteristics of the code of silence bear directly on the fact of bias as well as the origin and strength of the bias.[260] Thus, the underlying tenets of the police code of silence, similar to the Aryan Brotherhood in *Abel*, demonstrate that the witness possesses a strong incentive to slant the testimony towards his fellow officer, or even commit outright perjury.[261] In addition, while the trial court is given broad discretion in determining the admissibility of evidence under the Federal Rules,[262] Rule 403 is an "extraordinary remedy" which should be "used sparingly."[263] "The 'major function' of Rule 403 is 'limited to excluding matter of scant or cumula-

256. *See, e.g.*, Sanders v. City of Indianapolis, 837 F. Supp. 959 (S.D. Ind. 1992) (granting post-trial motion for judgment as a matter of law in favor of defendant municipality against excessive force claimant because only evidence presented by claimant in support of code of silence conspiracy claim was "speculation" that defendant police officers withheld truthful testimony on witness stand and expert witness specifically testified that he had no knowledge of code of silence in Indianapolis Police Department).

257. *See* FED. R. EVID. 201 (discussing judicial notice).

258. *See Shaw*, 1997 WL 187352, at *9.

259. *See id.* at *10.

260. *See* United States v. Abel, 469 U.S. at 45, 54 (1984).

261. *See id.*; United States v. Keys, 899 F.2d 983 (10th Cir. 1990).

262. *See Abel*, 469 U.S. at 54.

263. United States v. Plotke, 725 F.2d 1303, 1308 (11th Cir. 1984); *see also* United States v. Roberts, 88 F.3d 872, 880 (10th Cir. 1996); Wescott v. Crinklaw, 68 F.3d 1073, 1077-78 (8th Cir. 1995); United States v. Mende, 43 F.3d 1298, 1302 (9th Cir. 1995).

tive probative force, dragged in by the heels for the sake of its prejudicial effect.' "[264] A commission report is powerful evidence not because it is inflammatory or unfair, but because it is probative.[265]

Finally, the court's observation that the report would be admissible in every case, even in the event only one officer testifies, is not so. The premise is not that all police officers are liars, and that therefore any litigant should always be able to proffer evidence so indicating. Rather, there is a fairly specific foundation: where a code of silence has been established in a police force, and there is evidence that it is supported through retaliation, officers have a powerful motive to lie to avoid retaliation. Extrinsic evidence demonstrating such a likelihood, including expert testimony, should be permitted to demonstrate the code of silence and retaliation which give rise to the possible bias and motive to lie. This position is not inconsistent with the Ninth Circuit's decision in *Osborne v. City of Long Beach.*[266]

In finding that the district court erred in determining that code of silence evidence was more prejudicial than probative, the court in *Osborne* distinguished the case from its prior decision in *United States v. Dickens.*[267] In *Dickens*, the Court of Appeals for the Ninth Circuit reversed the conviction of a defendant which was based in part on extensive questioning of the defendant by the prosecutor on the defendant's alleged connection to "the mob."[268] The court held that the questioning was not admissible because "the defendant's bias in his own behalf was self-evident," and because the questioning was not intended to show bias and failed to demonstrate motive to lie or any bias with regard to the case.[269] Moreover, the court determined that the questioning was highly prejudicial because it associated the defendant with a "mob" drug ring, supporting an improper inference of guilt by association.[270] The court in *Os-*

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264. United States v. Cross, 928 F.2d 1030, 1048 (11th Cir. 1991) (quoting United States v. Sawyer, 799 F.2d 1494, 1506 (11th Cir. 1986)); *see also* United States v. McRae, 593 F.2d 700, 707 (5th Cir. 1979).

265. *See, e.g., Abel,* 469 U.S. at 54 (rejecting claim that evidence of bias based on membership in gang was more prejudicial than probative; the evidence "bore directly not only on the fact of bias but also on the source and strength of [the] bias"); United States v. Keys, 899 F.2d 983, 987-88 (10th Cir. 1990) (rejecting claim that evidence of possible retaliation based on gang membership was more prejudicial than probative, noting that "[c]redibility was crucial to the resolution of [the] case").

266. See *supra* notes 205-20 and accompanying text (discussing *Osborne*).

267. 775 F.2d 1056 (9th Cir. 1985).

268. *See id.* at 1059.

269. *Id.*

270. *See id.* at 1057-58.

*borne* distinguished *Dickens* in three ways: first, the court noted that unlike *Dickens*, the offered evidence suggested a motive for bias; second, since the rights of a criminally accused defendant were not implicated, an "inference of guilt" rationale carries much less weight in a civil suit; and third, the code of silence evidence "does not carry the prejudicial implications associated with criminal gangs; nor is any specific wrongdoing imputed by association to the . . . witness."[271]

Moreover, the court determined that "in a civil rights suit alleging police misconduct and cover-up, there are factors that favor admission of the evidence [of bias]."[272] Notably, the court recognized that jurors in an excessive force case can be expected to have a "natural bias" in favor of the truthfulness of the police officer defendants and against the claimant.[273]

In light of these considerations, as well as the strong impact that retaliation through a code of silence will have on the testimony of a police officer testifying on behalf of a fellow officer, there is a powerful argument that extrinsic evidence relating to a witness's bias and motive to lie in the form of a Commission report documenting the same should be admitted. As demonstrated in *Osborne*, the traditional concerns with the prejudicial impact of such extrinsic evidence under the circumstances at issue is mitigated, and admission of such evidence does not necessarily run afoul of Rule 403 scrutiny.[274]

In practice, impeachment on this basis would proceed like any other case of impeachment of a witness when there was evidence that testimony helpful to one party or the other might result in retaliation. Imagine a hypothetical situation similar to the one involving Daniel Batista, discussed *supra* at part II.A. A defendant in a criminal narcotics case, Michael Blanchard, claims that Officer Jones, a witness against him, was "doing doors"—breaking down the doors of drug dealers' apartments as a prelude to robbery. Blanchard claims that narcotics were planted on him to discredit him as a potential complaining witness and to provide cover for Jones's presence in the building; Officer Jones claims the arrest was both legitimate and based on probable cause. Officer Jones's partner, Officer Smith, can confirm or deny Officer Jones's version of the events.

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271. Osborne v. City of Long Beach, No. 87-6262, 1988 WL 141391, at *5 (9th Cir. Dec. 20, 1988).

272. *Id.*

273. *See id.* The court noted that "[i]t is counterintuitive to suspect officers holding such public trust of collaborating to obstruct justice. On the other hand, the plaintiff in this type of suit has typically been arrested at least once, and is often a member of a racial minority." *Id.*

274. *See id.* at *4-5.

In either case, Smith could be telling the truth. But Blanchard's attorney may be able to offer evidence which would give the jury a reasonable basis to conclude that officers in the local department are subject to a code of silence, and that if Officer Smith denies Jones's story, her career is over and she may be subject to life-threatening retaliation. In this situation, the impeachment should be allowed, if the defendant can show that there is a code of silence in this particular police department, and that there are penalties for its violation of a magnitude which might induce an officer to shade the truth.

### *C. The "Intractability" Problem and the Eyewitness Identification Analogy*

This article proposes that one reasonable approach to the problem of code of silence testimony is by impeachment of police witnesses through the use of extrinsic evidence demonstrating the existence and effect of the code, coupled with an instruction to the jury which draws attention to the suspect nature of potentially biased or slanted testimony. Extrinsic evidence will help the jury to understand that the code of silence exists in some police departments, acts as a strong deterrent to officers called to testify about the actions of colleagues, and provides an alternative explanation for consistent testimony in cases where the acts of fellow officers have been called into question.

Instructions concerning the general credibility of witnesses should always be given to the jury,[275] while other more specific instructions on credibility, including those which contain a "cautionary tail," are not always required. [276] A general credibility instruction which directs jurors to assess the extent to which they believe that the witnesses have been influenced by bias or some other motive to lie should be sufficient to give

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275. *See* 1 DEVITT ET AL., *supra* note 119, at 465 (introductory note); 1 *id.* § 15.01, at 467; 1 SAND ET AL., CRIMINAL, *supra* note 119, ¶ 7.01[1] cmt., at 7-4; 4 SAND ET AL., CIVIL, *supra* note 119, ¶ 76.01[1] cmt., at 76-3; WASHINGTON PATTERN JURY INSTRUCTIONS, CIVIL § 2.01 (3d ed. 1989); WASHINGTON PATTERN JURY INSTRUCTIONS, CRIMINAL § 6.01 (2d ed. 1994); *see also* Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 628 (1944) (" 'The jury were the judges of the credibility of the witnesses . . . and in weighing their testimony had the right to determine how much dependence was to be placed upon it.' ") (quoting Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88 (1891)).

276. *See* 1 DEVITT ET AL., *supra* note 119, at 465. Whether specific credibility instructions in individual cases are required or discretionary differs from jurisdiction to jurisdiction, and an examination of specific approaches is beyond the scope of this article. For a thorough treatment of this area of the law, see 1 *id.* ch. 15; 1 SAND ET AL., CRIMINAL, *supra* note 119, ¶ 7.01; 4 SAND ET AL., CIVIL, *supra* note 119, ¶ 76.01.

the jury useful guidance in evaluating the credibility of police witnesses and the weight to be given the witnesses' testimony.

Many general pattern credibility instructions include a provision indicating to the jury that they should consider a witness's bias or prejudice,[277] and suggesting that jurors use common sense in determining

277. *See, e.g.*, MODEL CRIMINAL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT, *supra* note 119, § 3.04, at 64; COMM. ON MODEL CRIMINAL JURY INSTRUCTIONS WITHIN THE NINTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT § 3.07, at 36 (1995); COMM. ON PATTERN CRIMINAL JURY INSTRUCTIONS, DISTRICT JUDGES ASS'N, SIXTH CIRCUIT, PATTERN CRIMINAL JURY INSTRUCTIONS § 1.07, at 25 (1991) [hereinafter PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE SIXTH CIRCUIT]; 1 COMM. ON STANDARD JURY INSTRUCTIONS, CIVIL, OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA, CALIFORNIA JURY INSTRUCTIONS, CIVIL § 2.20, at 29 (1994); ILLINOIS PATTERN JURY INSTRUCTIONS, CIVIL § 2.01 (3d ed. 1989); WASHINGTON PATTERN JURY INSTRUCTIONS, CIVIL, *supra* note 275, § 2.01; WASHINGTON PATTERN JURY INSTRUCTIONS, CRIMINAL, *supra* note 275, § 6.01; 2 DOUGLASS B. WRIGHT & WILLIAM L. ANKERMAN, CONNECTICUT JURY INSTRUCTIONS (CIVIL) §§ 640, 641, at 1016-18 (4th ed. 1993) [hereinafter CONNECTICUT JURY INSTRUCTIONS]; 1 DEVITT ET AL., *supra* note 119, § 15.01, at 466; 1 SAND ET AL., CRIMINAL, *supra* note 119, ¶ 7.01[1], at 7-3 to 7-4; 4 SAND ET AL., CIVIL, *supra* note 119, ¶ 76.01[1], at 76-2; COMM. ON PATTERN JURY INSTRUCTIONS, DISTRICT JUDGES ASS'N, FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) § 1.09, at 20 (1990); FEDERAL JUDICIAL CENTER, COMM. TO STUDY CRIMINAL JURY INSTRUCTIONS, PATTERN CRIMINAL JURY INSTRUCTIONS § 23 (1982).

A common general instruction on the credibility of witnesses is worded in pertinent part as follows:

> You are the sole judges of the credibility of the witnesses and of the weight to be given to the testimony of each of them. In determining the credit to be given any witness you may take into account his ability and opportunity to observe, his memory, his manner while testifying, and interest, bias or prejudice he may have, and the reasonableness of his testimony considered in light of all the evidence in the case.

ILLINOIS PATTERN JURY INSTRUCTIONS, CIVIL, *supra*, § 2.01. Other pattern instructions expand a bit on the various nonexhaustive factors that the jury should consider. For example, Connecticut suggests the following provision concerning bias and prejudice:

> You may well ask yourselves in passing on the credibility of any witness whether that witness has any bias or prejudice as regards any party to the action, and if so, whether he has permitted that bias or prejudice to color his testimony; and it of course does not follow simply from the fact that a witness does have a bias, prejudice or does have an interest in the outcome of the case that his testimony is to be disbelieved. There are many people who, no matter what their interest in the outcome of the case might be, would not testify falsely. One [sic] the other hand, a jury should always bear in mind that, if a witness has a decided bias or prejudice or has an interest in the outcome of the case, that bias or interest offers something of a temptation to sway or shade his own testimony as a result of it.

2 CONNECTICUT JURY INSTRUCTIONS, *supra*, § 641(c) (footnote omitted). In *Modern Federal Jury Instructions*, the authors provide specific, separate instructions on bias. *See* 1 SAND ET AL., CRIMINAL, *supra* note 119, ¶ 7.01[1], at 7-8 (instruction 7-2); 4 SAND ET AL., CIVIL, *supra* note 119, ¶ 76.01[1], at 76-10. These instructions, however, contain a form of "cautionary tail," which places their use in relation to police witnesses in question. *See supra* part III.C. For example, the criminal instruction on bias provides, in pertinent part: "Evidence that a witness is biased, prejudiced or hostile toward the defendant requires you to view that witness' testimony with caution, to weigh it with care, and subject it to close and searching scrutiny." 1 SAND ET AL., CRIMINAL, *supra* note 119, ¶ 7.01[1], at 7-8. The civil instruction is similar, providing that "you should consider evidence of any other interest

what testimony to accept or disregard.[278] Thus, when presented with evidence of a police code of silence enforced through retaliation coupled with an appropriate instruction, jurors will be in a better position to evaluate the credibility of the witnesses before them.

This approach should increase the accuracy of criminal trials. Police are no different from other members of institutions in that they have reason not to say anything to harm the organization for which they work; they are different from members of other institutions in that the consequences of disobedience can be life-threatening. Jurors should know that there may be multiple explanations for consistent and uniform police testimony.

This proposed solution is straightforward and justified by existing law. However, there may be more to the traditional judicial reluctance to deal with police perjury than meets the eye.[279] The hesitation of many courts to deal directly with police perjury may be understandable to a degree. The *Bush* and *Berrios* courts, for example, no doubt both deplored police perjury and recognized that it led to injustices. But they may have wanted to avoid introducing a significant element of uncertainty in criminal proceedings by acknowledging the problem while giving the factfinder no help in solving it. The problem of police perjury in this respect may be analogous to that of eyewitness identification testimony. Both categories may well be inaccurate and lead to the conviction of the innocent, in part because jurors ascribe too much credibility to the evidence. Yet, both are subcategories of testimony which is often reliable, and, as importantly, is indispensable. The criminal justice system would shut down if eyewitnesses or police officers were precluded from testify-

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or motive that the witness may have in cooperating with a particular party," and "[i]t is your duty to consider whether the witness has permitted any such bias or interest to color his testimony. In short, if you find that a witness is biased, you should view his testimony with caution, weigh it with care and subject it to close and searching scrutiny." 4 SAND ET AL., CIVIL, *supra* note 119, ¶ 76.01[1], at 76-10.

278. *See, e.g.*, CONNECTICUT JURY INSTRUCTIONS, *supra* note 277, §§ 640, 641, at 1016-18; PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE SIXTH CIRCUIT, *supra* note 277, § 1.07, at 26.

279. There is little to suggest that the actions of judges who do not aggressively deal with police perjury do so out of simple pro-prosecution bias. For example, judges J. Skelly Wright and Spottswood Robinson concurred with then-Judge Warren Burger in the decision in *Bush v. United States*, and both were defenders of individual rights. Judge Wright was famous for his liberalism. *See, e.g.*, Richard Parker, *In Memoriam: J. Skelly Wright*, 102 HARV. L. REV. 367, 368 (1988) (noting that Wright has been called "one of the great liberals of our time"); Patricia M. Wald, *In Memoriam: J. Skelly Wright*, 102 HARV. L. REV. 363, 365 (1988) (noting that Wright was a member of "a court that pioneered the expansion of the rights of criminal defendants"). Judge Robinson, a distinguished civil rights litigator before being appointed to the bench, was co-counsel for the opponents of segregation in *Brown v. Board of Education*.

ing simply because of the possibility of inaccurate or misleading testimony.[280]

There is an important difference between the two, however, with respect to the ability of the legal system to remedy them. The problem of mistaken identifications is at least to some degree intractable; imperfect recall is a feature of human memory. However, police perjury is not an inevitable feature of the human condition, and this approach may encourage changes in police behavior which will reduce the incidence of police perjury.

Eyewitness identification has been called "one of the most serious problems in the administration of criminal justice and civil litigation."[281] Courts[282] and commentators[283] frequently describe eyewitness identification testimony as inherently unreliable. Although it is often unreliable, juries find it very persuasive[284] and give it unjustified weight.[285] Accord-

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280. It may be true that it is better that 99 guilty people escape punishment rather than one innocent person be unjustly convicted, *see, e.g.*, SIDNEY HOOK, PHILOSOPHY AND PUBLIC POLICY 135-36 (1980), but even generally reliable evidence or procedures will result in tragic mistakes; this is inevitable in any human system of criminal justice. Thus, while the system should strive for accuracy, it is not a fatal criticism that it is not perfect.

281. ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 179 (1979). Elizabeth Loftus has been described as "the most publicly visible expert in this country on the strengths and weaknesses of eyewitness testimony." Hallisey, *supra* note 178, at 245.

282. *See, e.g.*, United States v. Wade, 388 U.S. 218, 228 (1967) ("[T]he vagaries of eyewitness identification are well-known."); United States v. Telfaire, 469 F.2d 552, 555 (D.C. Cir. 1972) (recognizing unreliability of eyewitness identifications); State v. Gaines, 926 P.2d 641, 645-49 (Kan. 1996) (discussing the problem of eyewitness identification in depth and concluding that expert testimony regarding such identifications should not be admitted); State v. Warren, 635 P.2d 1236, 1240 (Kan. 1980) (asserting that the "problem of the potential unreliability of eyewitness identifications has been with us for a long time").

283. *See, e.g.*, FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI 30 (1927); Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1014 (1995); Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259, 260 (1990-91); Wayne T. Westling, *The Case for Expert Witness Assistance to the Jury in Eyewitness Identification Cases*, 71 OR. L. REV. 93, 95, 103 (1992); Christopher M. Walters, Comment, *Admission of Expert Testimony on Eyewitness Identification*, 73 CALIF. L. REV. 1402, 1403 (1985). *See generally* Gregory G. Sarno, *Admissibility, At Criminal Prosecution, of Expert Testimony on Reliability of Eyewitness Testimony*, 46 A.L.R. 4th 1047 (1987 & Supp. 1997) (citing cases); D.E. Ytreberg, *Necessity and Admissibility of Expert Testimony as to Credibility of Witnesses*, 20 A.L.R. 3d 684 (1969 & Supp. 1996) (citing cases).

284. *See* Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) ("[T]here is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!' ") (quoting LOFTUS, *supra* note 281, at 19); *see also* R.C.L. Lindsay, *Expectations of Eyewitness Performance: Jurors' Verdicts Do Not Follow from Their Beliefs*, *in* ADULT EYEWITNESS TESTIMONY 362 (David Frank Ross et al. eds., 1994); Westling, *supra* note 283, at 95.

285. *See, e.g.*, Kampshoff v. Smith, 698 F.2d 581, 587 (2d Cir. 1983); Handberg, *supra* note

ingly, eyewitness identifications are a frequent cause of wrongful convictions.[286]

Scientists have studied the reasons for the unreliability of eyewitness identification.[287] Studies indicate that memory is a complex process which involves several stages and is affected by a number of factors which can alter an eyewitness's perceptions or actual memory of an event and render it unreliable.[288] In essence, "the normal and universal fallibilities of human sense perception and memory" and "the susceptibility of the human mind to suggestive influences" constitute the contributing factors to the problem of eyewitness identification.[289] This analysis of the inherent defects in human perception and memory, however, recognizes only half of the analysis of the problem—the problem of the "primary identification error."[290]

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283, at 1014; Westling, *supra* note 283, at 95; Cindy J. O'Hagan, Note, *When Seeing is Not Believing: The Case for Eyewitness Expert Testimony*, 81 GEO. L.J. 741, 742 (1993).

286. *See Wade*, 388 U.S. at 228 ("[T]he annals of criminal law are rife with instances of mistaken identification."); LOFTUS, *supra* note 281, at 201; PATRICK M. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 19 (1965); Michael H. Hoffheimer, *Requiring Jury Instructions on Eyewitness Identification Evidence at Federal Criminal Trials*, 80 J. CRIM. L. & CRIMINOLOGY 585, 585 & n.1 (1989); Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 PSYCHOL. PUB. POL'Y & L. 909, 909 (1995); Maureen A. Gorman, Note & Comment, *Evaluating Eyewitness Testimony in Criminal Trials: Can Jurors Use Help From Experts?* United States v. Downing, 63 CHI.-KENT L. REV. 137, 137 (1987); Brenda G. Hamilton, Note, *Expert Testimony on the Reliability of Eyewitness Identifications: A Critical Analysis of its Admissibility*, 54 MO. L. REV. 734, 734 (1989); *see also* Hallisey, *supra* note 178, at 240 (noting that "[a]t the root of our criminal justice system is the premise that '[i]t is far worse to convict an innocent man than to let a guilty man go free' "); Handberg, *supra* note 283, at 1014 (citing study which estimated that half of all wrongful convictions result from misidentifications).

287. *See, e.g.*, Hoffheimer, *supra* note 286, at 587 n.6 (listing sociological and psychological studies addressing problems of eyewitness misidentification); Hamilton, *supra* note 286, at 735 n.13 (listing psychological research studies concerning unreliability of eyewitness identification).

288. *See, e.g.*, Handberg, *supra* note 283, at 1017-18. Factors which may affect human perception and memory include:

> (1) the "forgetting curve," which indicates that forgetting occurs rapidly and then tends to level out and that therefore immediate identification is much more trustworthy than delayed identification; (2) "unconscious transfer," which occurs when the witness confuses a person seen in one situation with a person seen in a different situation; (3) "post-event information," which occurs when a witness talks to others about the incident, and then incorporates new information into his reconstruction of the incident; (4) the effects of stress upon perception: some psychologists maintain that, contrary to what most laymen believe, stress causes inaccuracy of perception; (5) contrary to laymen's intuitive beliefs, some studies indicate that there is no relationship between an eyewitness's confidence in his identification and the accuracy of that identification; and (6) the "own-race effect," which indicates that persons of one race have difficulty accurately identifying persons of another race.

Gorman, *supra* note 286, at 141-42; *see, e.g.*, State v. Gaines, 926 P.2d 641, 645-49 (Kan. 1996).

289. Westling, *supra* note 283, at 101.

290. Hoffheimer, *supra* note 286, at 587.

The second component to the analysis, the "secondary identification error," recognizes that "eyewitness identification evidence may be evaluated erroneously by a factfinder—usually a jury—which in convicting makes a secondary judgment of identity."[291] Pursuant to this secondary judgment of identity, jurors may perpetuate a primary identification error at trial.[292]

Courts and commentators have proposed a number of solutions designed to remedy the problems of eyewitness identifications. They include: (1) excluding certain types of eyewitness testimony on the grounds of unreliability;[293] (2) prohibiting convictions based "solely on eyewitness identification testimony" and requiring corroboration;[294] (3) mandating that the jurors be given cautionary instructions;[295] and (4) permitting expert psychological testimony regarding the issue of eyewitness identification.[296] These proposed solutions have been criticized for various reasons. Some object that exclusion for unreliability or requiring corroboration goes too far, because eyewitness testimony is often probative.[297]

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291. *Id.* at 588-90.

292. *See id.*

293. *See* LOFTUS, *supra* note 281, at 187; Fredric D. Woocher, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 1000-01 (1977).

294. LOFTUS, *supra* note 281, at 187; *see also* WALL, *supra* note 286, at 182-93; Edward Lasker, Comment, *Possible Procedural Safeguards Against Mistaken Identification by Eyewitnesses*, 2 UCLA L. REV. 552, 557 n.23 (1955).

295. *See* LOFTUS, *supra* note 281, at 187. In *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972), the United States Court of Appeals for the District of Columbia Circuit attached a model jury instruction to its decision which included an instruction that the government must prove identity beyond a reasonable doubt. *See id.* at 558. This instruction reminded the jury to consider the credibility of the eyewitness in the same way the jury considers the credibility of any other witness and listed three additional factors for the jury to consider in determining the reliability of an eyewitness identification: (1) whether the eyewitness "had the capacity and an adequate opportunity to observe the offender," (2) whether the identification "was the product of [the witness's] own recollection," and (3) whether the eyewitness made any inconsistent identifications. *Id.* at 558-59.

296. *See* LOFTUS, *supra* note 281, at 187.

297. For example, commentators have argued that the exclusion of all eyewitness identification evidence is untenable for at least one obvious reason: eyewitness identifications may in fact be accurate. *See* O'Hagan, *supra* note 285, at 752. Therefore, a rule of exclusion "would radically alter the detection and prosecution of offenses." Hoffheimer, *supra* note 286, at 593 n.27. In the interest of fairness to victims of crime, "it is both unadvisable and unrealistic to expect courts to always exclude them." O'Hagan, *supra* note 285, at 752.

The requirement of corroboration has also been attacked as "too harsh" a solution to the problem of the unreliability of eyewitness testimony because, even though an identification "may be probative, . . . the mandatory corroboration rule would exclude it" in the event of no corroboration. Rosenberg, *supra* note 283, at 308.

One commentator recognized the possibility that jury instruction on the reliability of eyewitness testimony may have an adverse effect on law enforcement by reducing the conviction rate of offend-

Others argue that allowing expert testimony or requiring jury instructions simply would not work.

For example, while some commentators consider jury instructions to be a promising solution to the problem of eyewitness identification,[298] others have suggested that jury instructions function better in theory than they do in practice. Some commentators argue that jurors do not give the necessary consideration to jury instructions that is required for them to fully grasp the instructions' purpose,[299] partially because they are often "long and tedious."[300] Moreover, even if jurors did give the requisite attention to the instructions, the instructions may "not supply the jury with any information that it can use in the task of evaluating the reliability of any particular eyewitness account."[301] Furthermore, jury instructions are given at the end of the presentation of the evidence, after most jurors have made their decisions with regard to the case.[302] Additionally, "most courts have refused to allow defendants to use expert testimony on eyewitness identification,"[303] excluding it most commonly on the grounds that it is within the common knowledge of the jury,[304] that it is too general to assist the jury,[305] or that its probative value is substantially outweighed by unfair prejudice.[306]

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ers. *See* Hoffheimer, *supra* note 286, at 596-98.

298. *See, e.g.*, Handberg, *supra* note 283, at 1060-61 (asserting that "the best way to deliver a message to the jury is through the judge").

299. *See* LOFTUS, *supra* note 281, at 190; Rosenberg, *supra* note 283, at 310.

300. LOFTUS, *supra* note 281, at 190; *see also* Handberg, *supra* note 283, at 1061; O'Hagan, *supra* note 285, at 753.

301. LOFTUS, *supra* note 281, at 189-90; *see also* O'Hagan, *supra* note 285, at 754 (asserting that "while the [*Telfaire*] instruction includes a list of factors that might contribute to misidentification, it does not explain the possible impact these factors may have on memory accuracy").

302. *See* Woocher, *supra* note 293, at 1005; O'Hagan, *supra* note 285, at 753-54.

303. Handberg, *supra* note 283, at 1015; *see also* O'Hagan, *supra* note 285, at 757; Walters, *supra* note 283, at 1408-09.

304. *See, e.g.*, United States v. Hudson, 884 F.2d 1016, 1024 (7th Cir. 1989); United States v. Purham, 725 F.2d 450, 454 (8th Cir. 1984); United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973); *see also* Gorman, *supra* note 286, at 153 (noting that those skeptical of the use of expert testimony assert that "since 'everybody knows' that witnesses can be mistaken, there is no need for an expert to testify to that phenomenon").

305. *See, e.g.*, United States v. Serna, 799 F.2d 842, 850 (2d Cir. 1986) (holding that expert testimony on eyewitness identification excluded under Rule 702 of the Federal Rules of Evidence because it consisted of only "general pronouncements" which would be of no assistance to the jury).

306. *See, e.g.*, United States v. Fosher, 590 F.2d 381, 382 (1st Cir. 1979). Commentators, however, have often supported the use of expert psychological testimony on eyewitness identification. *See* LOFTUS, *supra* note 281, at 201 (stating that allowing the jury to hear expert testimony on the factors affecting the reliability of eyewitness identification evidence appears to be a more satisfactory solution than excluding such evidence, requiring corroboration, or cautionary instructions); Robert Buckhout, *Eyewitness Testimony*, 231 SCI. AM. 23-31 (1974) (advocates admitting expert testimony

The problem with eyewitness identification, then, is that there is no cure to its inherent unreliability. There is now no mechanism by which the court or jury can determine for sure whether an identification, a memory, is accurate.[307] Thus, "[b]ecause the human mind functions as it does, problems with eyewitness identification will persist."[308] Moreover,

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on eyewitness identification on grounds that it is the province of the jury to decide whether to accept or reject it); Handberg, *supra* note 283, at 1015 (arguing that courts should admit expert testimony on eyewitness identification); Woocher, *supra* note 293, at 1006 (asserting that admission of expert psychological testimony provides the "proper safeguard" for identification concerns); Walters, *supra* note 283, at 1420. One commentator has argued that those in support of the exclusion of expert testimony ignore three important considerations:

> (1) the fact that eyewitness testimony is so powerful that it can cause a jury to disregard other exculpatory evidence . . .; (2) the existence of numerous scientific studies that indicate that several factors affecting perception, memory and recall are not known to the average juror and in fact are contrary to commonly-held intuitive beliefs; and (3) the obvious importance of what is at stake—the liberty and even life of the defendant on trial.

Gorman, *supra* note 286, at 153 (footnotes omitted). According to another commentator, "[p]sychologists have found that expert testimony about eyewitness identification assists jurors in appreciating and applying the appropriate scientific principles in specific cases." Handberg, *supra* note 283, at 1022. A few courts have accepted the use of expert eyewitness testimony, but have imposed limitations on its use. *See, e.g.*, United States v. Downing, 753 F.2d 1224, 1242-43 (3d Cir. 1985) (holding eyewitness testimony permitted, but limiting scope to give trial court right to exclude testimony under Rule 403, and requiring that testimony be "sufficiently tied to the facts of the case").

If an expert's testimony regarding the reliability of an eyewitness identification is admitted, the expert will generally become "a tutor for the jury," Walters, *supra* note 283, at 1406, to explain the unreliability involved in the memory process and relay the different factors that are involved in distortion of perception and memory retrieval. *See* O'Hagan, *supra* note 285, at 755-56; Walters, *supra* note 283, at 1407. See *supra* note 288 listing the factors that may affect human perception and memory. Such testimony will not provide an opinion regarding the accuracy of an identification. *See* Westling, *supra* note 283, at 104; Gorman, *supra* note 286, at 142; O'Hagan, *supra* note 285, at 755. Rather, the expert will present to the jurors the scientific data regarding memory and perception in order to assist them in properly evaluating the eyewitness testimony. *See* Westling, *supra* note 283, at 104; Gorman, *supra* note 286, at 142. Studies have indicated that expert psychological testimony in these cases significantly influences jurors' beliefs concerning memory and perception accuracy. *See* O'Hagan, *supra* note 285, at 756 (citing Harmon M. Hosch et al., *Influence of Expert Testimony Regarding Eyewitness Accuracy on Jury Decisions*, 4 LAW & HUM. BEHAV. 287, 294 (1980)). *But see* Michael McCloskey & Howard Egeth, *Eyewitness Identification—What Can a Psychologist Tell a Jury?*, 38 AM. PSYCHOL. 550, 550 (1983) (asserting that "it is by no means clear that expert psychological testimony about eyewitnesses would improve jurors' ability to evaluate eyewitness testimony"). According to one commentator, one study indicated that jurors lessened the significance of eyewitness testimony in relation to other testimony. *See* O'Hagan, *supra* note 285, at 756 (quoting Hosch et al., *supra*, at 294). In other studies, psychologists concluded that jurors take note of factors presented by the expert and " 'rely less on the confidence of the witness.' " *Id.* (quoting Steven D. Penrod & Brian L. Cutler, *Eyewitness Expert Testimony and Jury Decisionmaking*, 52 LAW & CONTEMP. PROBS. 43, 44 (1989)).

307. *See* O'Hagan, *supra* note 285, at 744, 747 (asserting that eyewitness testimony, like statistical evidence (which can never be admitted to prove identity in criminal cases), always retains a risk of error).

308. Westling, *supra* note 283, at 103.

the "solutions"[309] to eyewitness identification proposed by commentators and courts do not solve the problem at all, at least not fully—they merely attempt to define the problem for the jury in the hope that the jury can then adequately distinguish between accurate and inaccurate eyewitness identifications. But the accuracy and inaccuracy of the eyewitness's perceptions themselves, the "primary identification error[s],"[310] can never be altered. Thus, although the expert testimony or jury instruction may help to identify for the jury the problem areas of the eyewitness's memory or perception,[311] this will merely aid in averting a "secondary identification error."[312]

Furthermore, the "solutions" to eyewitness identification may often yield negative results. To illustrate, consider that, presumably in a jurisdiction that would allow expert testimony or jury instruction in an eyewitness identification case, the expert testimony or instruction would be admitted in each such case. But where there is no way to discern which cases will involve an erroneous eyewitness identification and which cases will not, admission of expert testimony or the submission of jury instructions may, in some cases, achieve adverse results by dulling the impact of accurate identification testimony.[313]

In police code of silence cases, however, there will be evidence of a specific distorting influence, namely, a code of silence enforced through retaliation. Even in jurisdictions hesitant to question eyewitness testimony in general, a particular eyewitness may be freely impeached on the ground that intoxication or poor eyesight might have affected his or her ability to perceive and recall the events at issue. Similarly, in the context of police testimony, impeachment based on the existence of a code of silence will rest on a specific predicate applicable to the particular case.

This proposal would offer some of the benefits of an intriguing idea recently proposed to deal with the problem of police perjury in the specific context of suppression hearings. Professor Donald Dripps suggests that "courts . . . should admit expert testimony based on polygraph ex-

309. *See supra* notes 293-96 and accompanying text.

310. Hoffheimer, *supra* note 286, at 587. See *supra* notes 287-92 and accompanying text (discussing primary and secondary identification error).

311. See *supra* note 288 for a non-exhaustive list of factors that may impact on an eyewitness's memory and perceptions.

312. Hoffheimer, *supra* note 286, at 588-89.

313. *See, e.g.*, McCloskey & Egeth, *supra* note 306, at 556 (asserting that one study indicated that expert testimony had "absolutely no effect on jurors' ability to discriminate accurate from inaccurate witnesses," and that the expert testimony merely appeared to reduce jurors' overall willingness to believe eyewitnesses).

aminations, and draw an adverse inference from the failure to introduce such evidence, whenever the outcome of the dispute depends on the credibility of conflicting testimony given by the defendant and the police."[314] One of the advantages to this approach is that it may alleviate the concerns that often cause judges to refrain from calling into question a police officer's credibility—it would allow the judge to effectively question the witness's candor while shifting the blame for doing so to the polygraph examinations themselves.[315] Moreover, this approach might systematically influence police behavior because "[t]he police may tell straighter stories to prosecutors before the hearing if they know that the story might be tested by a safeguard more material than the oath."[316] Indeed, the rule of polygraph admissibility would provide officers with the incentive to actively avoid "swearing contests," rather than encourage them, by "record[ing] the facts in a reliable way."[317]

Similarly, impeachment coupled with a jury instruction in code of silence perjury cases will encourage prosecutors and police executives to break down the blue wall of silence. The proposal has the virtue of not putting prosecutors or judges in the awkward position of appearing to personally question the credibility of police officers. The instruction will help address the problem of code of silence perjury in individual cases, while working toward alleviating the code's stronghold on a police force. First, "[a]n officer who understands that his testimony will be critically examined for signs of perjury may be less likely to misrepresent the facts."[318] Second, the jury instruction may motivate prosecutors and police executives to encourage police officers to act within the bounds of the law when dealing with suspects. The impeachment of a police witness coupled with a credibility instruction which indicates that an officer's testimony should be examined for bias, prejudice, or a motive to lie will undoubtedly send a message to jurors that there may be other explanations for consistent police testimony. Thus, when officers realize that their mechanism for evading responsibility for implicating others' misconduct is imperiled, they may choose to adjust their actions accordingly.

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314. Dripps, *supra* note 12, at 693. Professor Dripps recognizes the pervasiveness of both dropsy-type police perjury and code of silence perjury. *See id.* at 698-704.

315. *See id.* at 710.

316. *Id.*

317. *Id.* at 715.

318. Comment, *supra* note 12, at 523.

Admission of proof of bias and motive to lie combined with such a jury instruction might help pierce the code of silence and start officers in corruption-prone police departments across the nation on a path toward truthfulness in the courts. Once a police department breaks down the blue wall of silence, a motive to lie jury instruction would no longer be appropriate or necessary.

## V. CONCLUSION

Although the police code of silence has been exposed through both the Mollen Commission and the Christopher Commission reports, and through news media coverage, court treatment, and scholarly commentary,[319] it has remained a deeply ingrained problem throughout the nation's police forces. There is clearly no quick fix to the problem, and it will likely remain a concern unless it is confronted. The framework outlined in this article fashions a mechanism to address the problems of code of silence perjury, to effect a change in the way police officers approach the judicial oath, and even to effect a change in the extrajudicial conduct of police. Recognition of the problem and an appropriate solution, however, must first be embraced by the courts. Historical reluctance to view police testimony with suspicion is the cornerstone to many court decisions which place roadblocks along the way towards establishing police veracity on the witness stand. As envisioned by then-Judge Warren Burger, it is truly "a dismal reflection on society to say that when the guardians of its security are called to testify in court under oath, their testimony must be viewed with suspicion."[320] But in light of the wealth of evidence demonstrating the existence of inherent problems with police cultural development and departmental matrices throughout the nation, this dismal reflection appears to be well placed. Indeed, "it is an admirable society which is not afraid to recognize its shortcomings, and which takes appropriate steps to remedy them."[321]

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319. *See supra* notes 16-19 and accompanying text.
320. Bush v. United States, 375 F.2d 602, 604 (D.C. Cir. 1967).
321. Comment, *supra* note 12, at 520.